IN THE

Supreme Court of the United States

No. 70-34

SIERRA CLUB, a California corporation,
Petitioner,

vs.

ROGERS C. B. MORTON, individually and as Secretary of the Interior of the United States, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief of the County of Tulare as Amicus Curiae

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STATEMENT OF THE CASE

Mineral King is a valley in the Sierra Nevada Mountains of California, east of Visalia in the County of Tulare. It is not a wilderness and it has not been since the gold and silver mining days of the 1870's (A. 80). In the early 1900's hydroelectric facilities which are still in use were built at Mineral King (A. 75), and for several decades it has been a summer retreat. Many cabins, summer homes, two small resorts, a commercial pack station, and three public camp grounds are located there (A. 80).

Most of the land at Mineral King is owned by the United States and is managed by the United States Forest Service as part of the Sequoia National Forest. It adjoins Sequoia National Park which is managed by the National Park Service. The sole approach to Mineral King is a county-maintained road which passes through Sequoia National Park (A. 73). Since its expansion by Congress in 1926, Act of July 3, 1926, 44 Stat. 818, Sequoia National Park has bounded Mineral King on three sides. In general hunting is allowed in national forests but not in national parks. For that reason Mineral King was designated as a game refuge in the 1926 legislation to protect both animals and vacationers from hunters.[1]

For over twenty years Mineral King has been recognized as a potential site for one of the world's finest winter sports and ski areas.[2] In 1949 the Secretary of Agriculture created the Mineral King Recreation Area, reserving the valley for public recreation,[3] and tried to develop a winter sports area

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1. *Hearings on H.R. 4095 Before the House Committee on Public Lands,* 68th Cong., 1st Sess. 24 (1924)

2. Mineral King is "probably the most spectacular site for commercial [ski] development on the west slope of the Sierra." David S. Brower and Richard H. Felter, *Surveying California Ski Terrain,* 33 SIERRA CLUB BULL. 97, 102 (1948).

3. The order of reservation dated May 13, 1949 and signed by the Secretary of Agriculture is a map on file with the Forest Supervisor of the Sequoia National Forest and provides:

> By virtue of the authority vested in me as Secretary of Agriculture by the Act of June 4, 1897 (30 Stat. 35) and the Act of February 1, 1905 (30 Stat. 828), and in accordance with Regulation U-3(b) (Sec. 251.22, Chapter II, Title 36 C.F.R.) of this Department this area, as shown by this map and legal description, is classified as the Mineral King Recreation Area, and is hereby set apart and reserved for public recreation use and closed to all other occupancy and use except such uses as the Regional Forester may authorize as being consistent with recreation use.

so that "the scenic, aesthetic, and recreational resources of Mineral King can be enjoyed by the American people" (T.R. 52). At that time the Forest Service was unable to interest any developer in the project because of the expense of providing adequate access.

In 1965 the Forest Service published a prospectus inviting public bids for the construction and operation of recreational facilities at Mineral King. The proposal of Walt Disney Productions was chosen from six submitted, and the Forest Service granted Disney a preliminary permit to prepare a master plan for the Mineral King recreational area. The preliminary permit provided that a final permit would be granted only upon Forest Service approval of the master plan and award by the State of California of the first contract for construction of a significant portion of an access road (A. 166-67).

To make public recreation at Mineral King possible the State of California has proposed to construct a two-lane, all-weather access road (not a high speed "freeway" as the Sierra Club repeatedly asserts) (A. 54). After two studies and a public hearing on highway location and design, the California State Highway Commission adopted a route, a large portion of which follows the existing road (A. 54-73, 83-124).

The Mineral King Road was not approved in a vacuum. The Wilderness Act of 1964, 78 Stat. 890, 892, 16 U.S.C. § 1132(c), required the Secretary of the Interior to study roadless areas of more than 5,000 acres in national parks for possible inclusion in the National Wilderness Preservation System. The Department of the Interior held public hearings in 1966 in Fresno to gather local views on its wilderness proposals for Sequoia and Kings Canyon

National Parks. Access to Mineral King overshadowed any other issue discussed at the hearing, with the Sierra Club strongly opposing a corridor to make recreational use of Mineral King possible.

On the basis of the Secretary's recommendations, the President has now asked Congress to place 721,970 acres of Sequoia and Kings Canyon National Parks in wilderness management, while leaving an access corridor to permit recreational use of Mineral King. The President has also recommended that a 12,500 acre area of Sequoia National Park, adjacent to Mineral King, be excluded from wilderness so that it can be enjoyed by the many hikers, campers and cross-country skiers who will visit Mineral King.[4]

The Secretary of the Interior approved the segment of the road which would pass through Sequoia National Park after reviewing "all material available" (A. 139), including four studies[5] which considered the impact on the park and the forest, fish and wildlife, the giant Sequoias and streams, possible alternative routes and the opposition to the road. The road route was chosen to avoid harm to

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4. The Department of the Interior held two days of public hearings on November 21 and 22, 1966 in Fresno, California on its proposals for inclusion of certain areas of Sequoia and Kings Canyon National Parks in the National Wilderness Preservation System. *Official Report of Proceedings Before the National Park Service of the U.S. Department of the Interior, Fresno, California,* November 21, 22, 1966. The wilderness recommendations of the Secretary of the Interior, now embodied in H.R. 8626, 92d Cong., 1st Sess. (1971), specifically contemplate improvement of the Mineral King road to permit outdoor recreation at Mineral King. H.R. Doc. No. 92-102, 92d Cong., 1st Sess. (1971).

5. The four studies were the Report of Route Studies by the State of California (A. 57-73), the Hartesveldt Report (A. 83-124), the Clarkeson Engineering Report (A. 140-157) and the Forest Service Mineral King Highway Impact Survey Report, Stage I, April 1968.

any of the significant giant Sequoias for which the park was named (A. 62).

The final permit the Forest Service proposed to issue to Disney for the Mineral King development would actually be two permits: one a thirty-year term permit for approximately sixty-six acres "constituting the sites physically occupied by capital improvements" (A. 15); the other a supplemental revocable special use permit for about two hundred fifty acres for works necessary "in conjunction with the facilities and improvements" built under the term permit (A. 23).[6] This is the same procedure previously followed by the Forest Service in establishing eighty-four other ski areas in the national forests (A. 169).

In January 1969 the Forest Service approved the Disney master plan. In June 1969, after twenty years of Forest Service planning for public outdoor recreation at Mineral King, and nearly four years after the Forest Service publicly announced its solicitation of proposals, the Sierra Club brought an action in the district court for the Northern District of California seeking an injunction. It alleged the Secretaries of the Interior and Agriculture lacked authority to permit the proposed recreational use of Mineral King and abused their discretion in deciding to grant such permits. The trial court, after a hearing on affidavits, granted a preliminary injunction without requiring the Sierra Club to post a bond.

On interlocutory review of the preliminary injunction the court of appeals held that the Sierra Club lacked standing to maintain the action. It also held unanimously

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6 All permanent structures will be built on the approximately 66 acres held under term permit. See Reply Brief for Appellants, pp. 5-6, Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970).

that the district court had abused its discretion by granting the preliminary injunction, because there was little or no likelihood the Sierra Club could prevail on the merits.

With the preliminary injunction in force the National Park Service has refrained from issuing a permit to the State of California to improve the access road traversing Sequoia National Park, and the Forest Service has not issued its final permit to Disney.

The relevant portions of statutes involved are set out in the Appendix to the Brief for Petitioner.

INTEREST OF THE AMICUS CURIAE

This brief of an *amicus curiae* is filed pursuant to Rule 42 of this Court. It is filed by the County of Tulare, a political subdivision of the State of California, and is sponsored by the authorized law officer thereof, Calvin E. Baldwin, County Counsel. The County is the residence of the people most directly affected by the proposed recreational use of Mineral King.

The demand for public outdoor recreation facilities is expanding explosively and Tulare County is trying to help meet that demand in ways which protect the Sierra from the raw speculative plunder which has characterized so much recreational development in the past. For that reason the County has cooperated with federal and state authorities over several years in planning for year-round outdoor recreation at Mineral King.

Land use is also a critical economic concern to the County. Tulare County is an economically depressed area with high unemployment and a tax base too small to meet its growing requirements for public services. Approximately one-half of the land within its boundaries is in fed-

eral ownership and thus exempt from property tax. The County has inhibited rural subdivisions by encouraging the conservation of most of the private agricultural lands in the County under the California Land Conservation Act of 1965, CAL. GOV'T. CODE, §§ 51200-95. The Mineral King recreational area can help the County to provide for orderly development of public recreational facilities, to cure its present depressed economic condition and to mitigate the tax revenue losses associated with its land conservation program.

SUMMARY OF ARGUMENT

The Sierra Club Lacks Standing.

The Sierra Club is an old and respected institution. In its youth its members, mostly San Franciscans, chronicled their adventures—hiking, climbing and exploring in the Sierra. In its maturity it grew across the nation as an effective advocate in Congress for the preservation of nature and the wilderness.

Riding the crest of legitimate public concern for the environment the Sierra Club now asks this Court to anoint it as "Guardian ad Litem" of the public lands to impose its preference for minimal use of the national parks and forests on the American people. No one can dispute the need to protect our environment from continuing despoliation, but Congress, chosen by the people, is charged by the Constitution with responsibility for public lands. Congress has delegated the management of these lands to the executive branch, not to the courts, and not to private conservation clubs.

No arm of the government other than the executive is capable of administering the public lands. This case involves decisions about permits to use approximately 316

acres of Forest Service land. This decision-making process is repeated time after time, day after day, throughout the 44,000,000 acres of federal public land in California alone. Neither Congress nor the judiciary is capable of scrutinizing each land management decision challenged by a "public interest" club.

The district court acted erroneously when it abandoned well-established principles of standing to permit the Sierra Club to maintain this action. This Court has recognized only two ways in which a plaintiff can have standing: either through establishing his own personal stake in the outcome, *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150 (1970), or by acting as a private attorney general deputized by Congress in a regulatory statute to assert the public interest against an administrator who strays beyond the limits of his authority. *Associated Industries v. Ickes,* 134 F.2d 694 (2d Cir.), *vacated as moot,* 320 U.S. 707 (1943).

The Sierra Club has failed to show a personal stake in the outcome of this case.[7] An organization's personal stake can be injury to itself as an organization or as a representative of its members. The Sierra Club has shown neither. It is not harmed as a club. Having previously suggested that Mineral King was a good place for a ski area,[8] the Sierra Club could reverse its opposition tomor-

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7. For a thorough discussion of the personal interest requirement and why it should continue to be the test of standing, see Comment, *Standing to Challenge Administrative Action: The Concept of Personal Stake,* 39 GEO. WASH. L. REV. 570 (1971).

8. In 1965 Seymour Ossofsky of the Sierra Club urged a House Interior Subcommittee not to allow the Secretary of Agriculture to permit skiing at San Gorgonio in Southern California. He testified:

I also speak as the chairman of the ski mountaineers section of the Sierra Club chapter in this area. I have been an official of that organization in various capacities for 7 years. I am also a

row. Nor will any of its members suffer special harm if public winter sports are permitted at Mineral King. The judicial process should not be manipulated at the whim of groups which have no personal stake in the outcome of litigation.[9]

The Sierra Club, in recognition of its lack of personal stake in the outcome, asserts that it is a private attorney general with a mandate flowing from Section 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702, to redress the sins of erring administrators. Congress can designate a person with no personal stake in the outcome of litigation as

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member of the Far West Ski Association. Thus, I speak as a person devoted to resort skiing as well as wilderness (cross-country) skiing. . . .

San Gorgonio is overrated as a ski area in another important respect—its convenience to Los Angeles. . . .

But in contrast, it will only be 4 or 5 hours drive to projected ski resorts in the Sierra Nevadas such as Mineral King and Robinson Basin. Both offer far better skiing than San Gorgonio; and Mineral King is even now being bid upon for development in the very near future. *Hearings on H.R. 6891 and Related Bills Before the Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs,* 89th Cong., 1st Sess., ser. 89-36, 344-45 (1965).

9. The Sierra Club is not attempting to vindicate a legal right, but to impose its current policy views on the Secretary of Agriculture and the public. Although it claims to represent the "public interest" in conservation, many conservationists support recreational use of Mineral King and are actively advising Disney on its plans. They include: "Horace M. Albright, former director of the National Park Service and former superintendent of Yellowstone National Park; Dr. Paul F. Brandwein, president, Center for Study of Instruction and former director of Gifford Pinchot Institute for Conservation Studies; Thomas L. Kimball, executive director, National Wildlife Federation; Bestor Robinson, former president and board member of Sierra Club, and formerly chairman of the Interior Secretary's advisory committee on conservation; Eivind T. Scoyen, former superintendent of Sequoia and Kings Canyon National Park and associate director of National Park Service, and William E. Towell, executive vice president, American Forestry Association." L.A. Herald Examiner, Nov. 22, 1969.

a private attorney general to enforce the public obligations of an executive officer. However, such designations have been made only in special regulatory statutes which force the private attorney general to participate in the administrative process, subject to regulations which protect the integrity of the administrative process. If Congress desires the assistance of a roving "private attorney general" to ferret out agency indiscretion in public land management and to place it at the feet of the court, it has not yet so indicated, either expressly or impliedly. The Ninth Circuit properly refused to allow the Sierra Club to invoke the private attorney general status.

The district court's decision ignores Constitutional considerations and the need to safeguard the courts and to further administrative efficiency. It goes far beyond any public interest in conservation and the environment, making every agency action potentially reviewable. The recent flood of suits challenging land management decisions has already prompted the Public Land Law Review Commission to say: "[W]e are apprehensive about the adverse effect on public land management programs which extensive litigation, such as we have witnessed in the last year, might produce."[10]

In urging reversal of the Ninth Circuit decision, the Sierra Club asks this Court to abolish the requirement of standing when administrative decisions are challenged, and to interpose years of delay in the execution of management decisions of all agencies—across the board—at the instance of any "public interest" group.

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10. PUBLIC LAND LAW REVIEW COMM., ONE THIRD OF THE NATION'S LAND, A REPORT TO THE PRESIDENT AND CONGRESS 256 (1970).

The Sierra Club Will Not Prevail on the Merits

The district court erred in issuing the preliminary injunction which has already delayed the Mineral King development over two years. At the hearing on its motion for a preliminary injunction the Sierra Club did not show a strong likelihood or reasonable certainty that it would prevail on the merits.

The Sierra Club has attacked the Secretary of Agriculture's historic practice of combining term and revocable permits for use of national forest land as an "evasion" of acreage "limitations" on term permits. The legislative history of 16 U.S.C. § 497 which authorizes term permits is clear beyond argument; term permits were first authorized in 1915 and their use has been expanded since that time for the sole purpose of granting permittees the security of tenure necessary to obtain construction financing. Were it not for this need the facilities at Mineral King and at eighty-four other western ski resorts holding combined term and revocable permits could be located on Forest Service land held entirely under revocable permit. 16 U.S.C. § 551.

The Sierra Club also asserts that the Secretary of Agriculture abused his discretion by deciding to permit public outdoor recreation in an area described by Congress as the Sequoia National Game Refuge. A game refuge is an area where hunting is prohibited except as authorized by the Secretary. Prohibition of hunting was the sole consequence of Congress' designation of the Mineral King area as the Sequoia National Game Refuge. It did not seal that area off from public recreational use. To the contrary, Mineral King was used for recreation long before it became a game refuge, and that use has never been interrupted. There are several public campgrounds at Mineral King, and one

reason Congress banned hunting was to protect vacationers. Continued recreational use of Mineral King was guaranteed by the Secretary of Agriculture over twenty years ago when he withdrew the area from mining entry to establish the Mineral King Recreational Area.[11]

The Secretary's decison to realize the public winter recreational potential of Mineral King was not a hasty decision. It was an outgrowth of twenty years of Forest Service planning which included extensive surveys and studies, considering, among other things, the impact of such use on the fish and game in the area.

The Sierra Club further asserts that the Secretary of the Interior threatens to violate 16 U.S.C. § 45c by permitting construction of a power line across Sequoia National Park to serve Mineral King. The Secretary has authority to grant revocable, 16 U.S.C. § 79, or term, 16 U.S.C. § 5, rights-of-way for power lines. Section 45c only prohibits Federal Power Commission licensing of hydro-electric power projects and associated primary transmission lines. Since the proposed line is neither a part of a hydro-electric power project nor a primary transmission line, the Secretary's authority to grant this right-of-way is not affected by 16 U.S.C. 45c.

The Secretary of the Interior also has authority to permit the State of California to improve the Mineral King access road. 16 U.S.C. § § 1, 8. Contrary to the Sierra Club's contention, it is neither unlawful nor an abuse of discretion for the Secretary to permit a road to traverse Sequoia National Park to serve the adjoining public national forest lands. The record before the trial court and the recent National Park Service wilderness recommendations for

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11. See note 3 *supra*.

Sequoia National Park demonstrate that the Secretary was exacting in his consideration of the environmental impact of the proposed road.

Since the Secretaries of the Interior and Agriculture in reaching their respective decisions concerning Mineral King acted within the scope of their delegated authority, did not abuse their statutory discretion and followed all necessary procedural requirements, their decisions must stand. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402. (1971).

At the hearing on the preliminary injunction the Sierra Club showed no imminent threat of irreparable harm to it. No physical alteration of Mineral King would have taken place for at least a year. On the other hand, the district court's issuance of a temporary injunction has damaged the United States, the State of California, Tulare County and Disney.

Since there was no strong likelihood or reasonable certainty that the Sierra Club would prevail on the merits, and since there was no immediate threat of harm to it, it was an abuse of discretion for the district court to issue a preliminary injunction.

ARGUMENT

I. THE SIERRA CLUB LACKS STANDING TO MAINTAIN THIS ACTION.

A. The Sierra Club Has No Personal or Direct Interest in the Outcome of This Case.

The Sierra Club has no standing in its own right because it has no personal or direct interest in the outcome of this suit. It has never alleged any individualized injury to itself either as a club or as a representative of its members.

This Court long ago held that to have standing in his own right a party must show "he has sustained or is

immediately in danger of sustaining some direct injury . . . and not merely that he suffers in some indefinite way in common with people generally." *Frothingham v. Mellon,* 262 U.S. 447, 488 (1923). This is an outgrowth of Article III of the Constitution which limits the jurisdiction of federal courts to cases and controversies. U.S. CONST. art. III, § 2. In a recent taxpayer suit this Court reemphasized that the Constitution requires a plaintiff to have *"the personal stake and interest* that imparts the necessary concrete adverseness to such litigation so that standing can be conferred . . . consistent with the Constitutional limitations of Article III." *Flast v. Cohen,* 392 U.S. 83, 101 (1968). (Emphasis added.)

Traditionally, this personal stake had to be a recognized legal interest, a "legal right." This common law rule of standing was summarized in *Tennessee Electric Power Co. v. T.V.A.,* 306 U.S. 118, 137-38 (1939), holding that persons threatened with injury could not challenge governmental action "unless the right invaded is a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."

Later a substantive legal right was not required when an action was brought pursuant to a specific statutory grant of standing. Thus, this Court in *F.C.C. v. Sanders Bros. Radio Station,* 309 U.S. 470 (1940), granted standing to a competitor to challenge a decision of the Federal Communications Commission under the Federal Communications Act, which allows appeal by persons "aggrieved", though the type of injury to competition involved had never been a traditional legal right.

The Sierra Club's alleged interest in this case is in conservational, recreational and aesthetic values of Mineral King and Sequoia Park. This is not a traditional legal right,[12] nor do any of the relevant land management statutes specifically authorize persons to challenge the decisions of the Secretaries of the Interior and Agriculture. The Sierra Club, however, bases its claim of standing upon Section 10(a) of the Administrative Procedure Act, 5 U.S.C. §§ 551-706.

When passed in 1946, the APA exerted little immediate influence on the law of standing. It was given a more restrictive interpretation than specific regulatory statutes with standing provisions. Courts construed it as merely "reflecting existing law" and required that a party show a legal right when standing was based solely on Administrative Procedure Act provisions.[13] However, the most recent decision of this Court interpreting that act, *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150 (1970), indicates that the test of standing under the Administrative Procedure Act is broader than the "legal right" test. To have standing to challenge administrative action under this act a plaintiff must show an "injury in fact" to an interest "arguably within the zone of interests to be protected or regulated by the [relevant] statute. . . ."[14]

To establish standing under the Administrative Procedure Act, then, the Sierra Club must first show that it is "injured in fact" as a club or that it represents its members

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12. Historically "legal right" has been very narrowly interpreted. As this term is used by courts it means a right recognized at common law or an interest specifically created by statute. See Associated Industries v. Ickes, 134 F.2d 694, 700 (2d Cir. 1943).

13. *Cf.*, Kansas City Power & Light Co. v. McKay, 225 F.2d 924 (D.C. Cir.), *cert. denied,* 350 U.S. 884 (1955).

14. 397 U.S. 150, 152, 153 (1970).

who are so injured. The requirement of an "injury in fact" to the complaining party is a Constitutional one, and indicates that this Court, although no longer requiring a legal right in cases arising under the Administrative Procedure Act, has not dispensed with the direct or personal interest in the outcome described in *Flast*.[15]

The Sierra Club has not satisfied this requirement. It alleges a general harm to the "public interest," complaining that recreational use of Mineral King will result in "permanent destruction of natural values" and "irreparable harm to the public interest" (A. 212). It has never argued that it has suffered any special injury as an organization. It could not; its purely ideological interest in the preservation of Mineral King and Sequoia National Park is not sufficient to establish the requisite injury in fact under *Data Processing*.

The Sierra Club has a preference for the preservation of the *status quo*. It is now asserting that bias in dozens of actions across the entire country. Brief for the Wilderness Society as Amicus Curiae, p. 14. By assuming the role of a roving quasi-public enforcer, the Sierra Club relinquishes any claim it may have to special injury in fact or personal stake in the outcome of each of these pending suits.[16]

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15. Thus in *Data Processing* this Court applying its "injury in fact" test found, "there can be no doubt but that petitioners have satisfied this test," 397 U.S. at 152. And in Barlow v. Collins, 397 U.S. 159, 164 (1970), this Court said: "there is no doubt that in the context of this litigation the tenant farmers . . . have the personal stake and interest" required.

16. The Ninth Circuit recognized this. Applying the *Data Processing* test of standing that court correctly found that the Sierra Club did not have that direct and personal interest necessary for injury in fact:

> The complainant does not assert that any of its property will be damaged, that its organization or members will be endangered or that its status will be threatened. . . . We do not believe that such club concern without a showing of more direct interest can constitute standing. . . .(A. 217).

The Sierra Club would have this Court dispense with the requirement of a direct and personal injury in fact altogether and find a club's *mere assertion of harm to the public interest* a sufficient basis for standing under the Administrative Procedure Act. To justify this novel theory of standing the Sierra Club looks to the issue to be litigated, diverting attention away from itself. It warns that if it is denied standing many types of lawless administrative action will remain beyond the reach of justice. This approach was rejected in *Flast v. Cohen*: "the fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and *not on the issues he wishes to have adjudicated.*"[17]

The Sierra Club has tried to gloss over this lack of personal interest by misstating the *Data Processing* holding. It erroneously contends that, "With or without the benefit of an express statute providing for judicial review, a person 'arguably within the zone of interests protected by a statute' has standing to seek review of an administrative decision based upon the statute," (B. 29). The Sierra Club recites only half of the *Data Processing* holding. A party within the "zone of interests" has standing only if it can first show it is "injured in fact." A party such as the Sierra Club relying upon *Data Processing* must fulfill *both* requirements.

The plaintiffs in *Data Processing* and in its companion case, *Barlow v. Collins,* 397 U.S. 159 (1970), satisfied both conditions. In *Data Processing* computer service organizations whose competitive positions were directly threatened had standing because one of the purposes of the revelant

17. 392 U.S. 83, 99 (1968). (Emphasis added.)

statute, the Bank Service Corporation Act of 1962, 12 U.S.C. § 1864, 76 Stat. 1132, was to protect the economic interest of potential competitors from bank expansion into new markets. In *Barlow v. Collins,* plaintiffs were tenant farmers challenging regulations of the Secretary of Agriculture which would have increased the farmers' economic dependence on their landlords. Here again, plaintiffs were held to have standing since their injury was palpable and the statute, the Food and Agriculture Act of 1965, 7 U.S.C. § 1444(d)(10), 79 Stat. 1196, expressly directed the Secretary to protect the tenants' interests.

The Sierra Club not only lacks the personal interest in the outcome of the suit required to satisfy the *Data Processing* requirement of injury in fact, but it also does not fall within the zone of interests of any relevant land management statute. Because it is unable to identify any statute passed to protect its particular preferences, the Sierra Club has made an elaborate argument that it is within the protection of the entire "Conservation Code." There is no such thing as a "Conservation Code." The land management statutes found in Title 16 of the United States Code were passed at different times over several decades for many different purposes. Calling them the "Conservation Code" does not create a zone of interests to give the Sierra Club standing to challenge each section from internal management provisions to park boundary descriptions.

Until recently there was no judicial authority for the Sierra Club's assertion that a plaintiff need have no interest of his own in the outcome of litigation. Professor Davis, writing in 1968 before *Data Processing,* found that a personal interest was the one consistent requirement in federal standing law:

> Even though the law of standing is so cluttered and confused that almost every proposition has some exception, *the federal courts have consistently adhered to one major proposition without exception: one who has no interest of his own at stake always lacks standing.*[18]

The case at bar gives this Court the opportunity to clear up any uncertainty surrounding standing to challenge administrative action under the Administrative Procedure Act, and to confirm that injury in fact, a direct and personal stake in the outcome of a suit, is required under the act. This test satisfies Article III and at the same time permits maximum access to the courts by parties injured by agency action. This injury need not be to a legal or economic interest. Injury to health and safety, to a constitutional interest, or recreational or aesthetic injury can be a sufficient basis for standing if it is an identifiable injury to an interest of the plaintiff distinct from persons in general.[19] Since the Sierra Club can show no such direct or personal interest in the outcome of this suit and is not within the

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18. Davis, *Standing: Taxpayers and Others,* 35 U. CHI. L. REV. 601, 617 (1968).

19. Flast v. Cohen, 392 U.S. 83 (1968) and Baker v. Carr, 369 U.S. 186 (1962), (constitutional interest is freedom of religion and the right to vote); Alameda Conservation Ass'n. v. California, 437 F.2d 1087 (9th Cir. 1971) (aesthetic and recreational injury); Crowther v. Seaborg, 312 F. Supp. 1205 (D. Colo. 1970) (health and safety, atomic testing). Though "injury in fact" is generally economic, other interests can be protected as well. This Court so indicated in *Data Processing* when, *in dicta,* it stated that "aesthetic, conservational, and recreational" values could at times be the basis for standing, 397 U.S. at 153. It is interesting to note, however, that the two examples cited, Scenic Hudson Preservation Conf. v. F.P.C., 354 F.2d 608 (2d Cir. 1965) and United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966) were both "private attorney general" suits where the decisions rested on an explicit provision in a regulatory statute rather than any finding of "injury in fact". See text accompanying notes 19-34 *infra.*

zone of interests of any relevant statute, it should be denied standing.

B. The Sierra Club Does Not Have Standing as a Private Attorney General.

Though the Sierra Club can demonstrate no basis for standing to assert its own interest, it seeks to champion the "public interest" in conservation. It asks this Court to ordain it "Guardian ad Litem" of the public lands, urging, "it is unlikely that lawless administrative action will be judicially reviewed and corrected unless at the behest of some organization acting as 'private attorney general'" (B. 19).

The Sierra Club's brief fails to distinguish between standing based on a party's personal stake in the outcome of a suit and standing to assert the public interest, but it is apparent that the Club has relied primarily on a private attorney general theory of standing. It does not claim that the court of appeals erred in failing to find it "injured in fact." It does contend, however, that the court should have permitted it to litigate the public interest as a private attorney general (B. 25-26).

In arguing that it has standing as a private attorney general, the Sierra Club has erroneously relied on cases where the plaintiffs did suffer a direct or personal injury.[20] These

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20. For example, the Sierra Club relies on both Association of Data Processing Service Organization v. Camp, 397 U.S. 150 (1970) and its companion case, Barlow v. Collins, 397 U.S. 159 (1970). In each of these cases this Court found that the plaintiffs were injured in fact, see n.15, *supra*. Also, in each case this Court distinguished the situation where a petitioner asserts only the public interest. In *Data Processing* this Court found the private attorneys general theory of standing "inapplicable to the present case", 397 U.S. at 153 n. 1. The concurring opinion in *Barlow* stated: "The plaintiffs in the present cases alleged distinctive and discriminating harm, obviously linked to agency action. Thus, I do not consider what must be alleged to satisfy the standing requirement by parties who have sustained no special harm themselves but sue rather as taxpayers or citizens to vindicate the interests of the general public," 397 U.S. at 172 n. 5.

cases hold only that a party who has standing to assert his own interest can also argue to the court that the public interest will be adversely affected.[21] In a true "private attorney general" action, the petitioner has no direct or personal interest in the outcome; he bases standing solely on his representation of the public interest.[22]

This Court has recognized that Article III can be satisfied by a party without a direct or personal interest under a "private attorney general" theory. The Second Circuit in *Associated Industries v. Ickes,* 134 F.2d 694, 704 (2d Cir. 1943), first announced the doctrine and explained how it is reconciled with Article III:

> While Congress can constitutionally authorize no one, in the absence of an actual justiciable controversy, to bring a suit for the judicial determination either of the constitutionality of a statute or the scope of powers conferred by a statute upon government officers, it can constitutionally authorize one of its own officials, such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers; for then an actual controversy exists, and the Attorney General can properly be vested with

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21. For example, in *Data Processing* after holding that a competitor is injured in fact, this Court went on to say, "Certainly he who is 'likely to be financially injured' . . . may be a reliable attorney general to litigate the issue of the public interest in the present case," 397 U.S. at 154.

Davis also has made this distinction: "Although one cannot gain standing by asserting that another private party is adversely affected or that the public is adversely affected by the challenged action, any party to a proceeding properly commenced may argue that a non-party or the public will be adversely affected by the assertedly illegal decision," Davis, *Standing: Taxpayers and Others,* 35 U. CHI. L. REV. 601, 630 (1968). (All italicized in original.)

22. *Cf.,* Scripps-Howard Radio, Inc. v. F.C.C., 316 U.S. 4, 14 (1942), "these private litigants have standing only as representatives of the public interest."

> authority, in such a controversy, to vindicate the interest of the public or the government. Instead of designating the Attorney General, or some other public officer, to bring such proceeding, Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then in like manner, there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private attorney generals. 134 F.2d at 704.

The main condition the *Associated Industries* case imposes on parties invoking the private attorney general status is that there be a Congressional grant of standing. Mr. Justice Harlan has explained that this requirement is based in part upon the doctrine of separation of powers:

> This Court has previously held that individual litigants have standing to represent the public interest, despite their lack of economic or other personal interests, if Congress has appropriately authorized such suits. . . . I would adhere to that principle. Any hazards to the proper allocation of authority among the three branches of the Government would be substantially diminished if public actions had been pertinently authorized by Congress and the President. I appreciate that this Court does not ordinarily await the mandate of other branches of the Government, but it seems to me that the extraordinary character of public actions, and of the mischievous, if not dangerous, consequences they involve for the proper functioning of our constitutional system, and in particular of the federal courts, makes such judicial forbearance the part of wisdom.

> It must be emphasized that the implications of these questions of judicial policy are of fundamental significance for the other branches of the Federal Government. *Flast v. Cohen,* 392 U.S. 83, 131-33 (1968) (dissent). (Footnotes and citations omitted.)

Congressional authorization of such suits in regulatory statutes also helps the courts to identify the "public interest" by specifying the particular values an agency must protect.

One of the best examples of the application of this theory is *Scenic Hudson Preservation Conference v. Federal Power Commission,* 354 F.2d 608 (2d Cir. 1965), *cert. denied* 384 U.S. 941 (1966).[23] In that case, conservation organizations sought standing under Section 313(b) of the Federal Power Act, 16 U.S.C. § 825e(b):

> Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals. . . .

The Second Circuit held that the plaintiffs' assertion of the public interest in aesthetic values, conservation and recreation was sufficient for standing under that Act. In *United Church of Christ v. F.C.C.,* 359 F.2d 994 (D.C. Cir. 1966), the court recognized plaintiffs' standing to represent the interests of the listening audience under Section 402(b)(6) of the Federal Communications Act, 47 U.S.C. § 402,

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23. Though the court did say that the plaintiffs showed a "special interest," 354 F.2d at 616, and indicated that one group would suffer economic loss as well, the court neither specifically identified all the plaintiff organizations nor linked any particular plaintiff with any particular issue. In fact the court referred to the plaintiffs' "representation of the common interest." Therefore this decision is better explained as a private attorney general suit arising under the Federal Power Act than one which turned on any "injury in fact" to the plaintiffs.

which allows appeals by persons "aggrieved or whose interests are adversely affected" by the Federal Communications Commission.

In both cases, Congressional authorization of the assertion by private parties of the public interest was implied by the court from the standing provision of a specific regulatory statute.[24] This Court too has recognized that standing to assert the public interest "rests on an explicit provision in a regulatory statute conferring standing."[25] There is no such regulatory statute to confer standing on the Sierra Club. The land management statutes at issue contain no special standing or review provisions; planning statutes in general do not authorize such suits.[26]

Lacking the foundation of specific Congressional authorization, the Sierra Club asks this Court to find that Congress authorized it to vindicate its view of the public interest as a private attorney general under Section 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702. To support this the

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24. Other such regulatory statutes include: § 9(a) of the Securities Act of 1933, 15 U.S.C. § 77i(a), "person aggrieved"; § 24(a) of the Public Utility Holding Co. Act of 1934, 15 U.S.C. § 79x(a) "person aggrieved"; § 701(f)(1) of the Food, Drug and Cosmetic Act, 21 U.S.C. § 371(f)(1), persons "adversely affected"; § 1(20) of the Interstate Commerce Act, 49 U.S.C. § 1(20), "any party in interest".

25. Association of Data Processing Service Organization, Inc. v. Camp, 397 U.S. 150, 153, n. 1 (1970).

26. There have been various Congressional proposals to change this. See H.R. 49, H.R. 5074, H.R. 5075, H.R. 5076, H.R. 8331 and S. 1032 (all 92d Cong., 1st Sess. 1971) which would give private citizens standing to challenge agency decisions affecting the environment. These bills are similar to Michigan's Environmental Protection Act of 1970, MICH. COMP. LAWS ANN. §§ 691.1201-07, which provides that any government agency, "Person", or "legal entity" may seek equitable relief against any other governmental agency, "person", or "legal entity for the protection of the air, water, or other natural resources and the public trust therein from pollution, impairment or destruction."

Sierra Club argues that the term "aggrieved" under Section 10(a) means the same as "aggrieved" in particular regulatory statutes. Congress did not authorize such a broad grant of standing. The Administrative Procedure Act, unlike specific regulatory statutes, applies to *all* administrative agencies[27] and Section 10(a) was not intended to make every citizen a private attorney general to police every administrative activity. A grant of universal standing to private attorneys general would be repugnant to any notion that the Administrative Procedure Act "reflects existing law."[28]

There is no reason to think "aggrieved" within one statutory framework must mean the same as "aggrieved" within another. Historically, courts have treated standing provisions in regulatory statutes differently from those in the Administrative Procedure Act though the wording is similar.[29]

The "aggrieved" provisions which have been the basis of private attorney general suits are contained in statutes which regulate adjudicatory agencies,[30] agencies which hold administrative hearings in the regular course of their business. These provisions generally permit participants in

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27. Professor Jaffe has commented on this distinction:
[There is] no question that it may be appropriate that *particular statutes* enable anyone, . . . to invoke the discretionary jurisdiction of a court even without regard to 'grievance' . . . But is there a case in the federal system for an across-the-board grant of such jurisdiction? Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 288-89, n.99 (1961).

28. The statute as enacted conforms to the draft which came out of conferences between the Government and the American Bar Association. The Attorney General stated to Congress: "this reflects existing law." S. Doc. No. 248, 79th Cong., 2nd Sess. 310 (1946).

29. See text accompanying notes 11-14, *supra*.

30. See note 24, *supra*.

these hearings to obtain judicial review of the final agency decision.

The Federal Power Commission is an adjudicatory agency, and the Federal Power Act gives the right to seek review to *"parties aggrieved,"* not persons aggrieved. Congress intended to give more persons standing to appear at hearings before the Commission, and to insure that *parties* could obtain judicial review. Other parts of the act however, insure that administrative efficiency is safeguarded. Under the act the Commission itself controls through regulations who can be parties.[31] Similarly, under the Federal Communications Act in *United Church of Christ v. F.C.C.*, 359 F.2d 994 (D.C. 1966), the court enlarged standing before the Federal Communications Commission by allowing interested non-parties to intervene. The court emphasized that the administrative process need not be obstructed or overwhelmed because the Commission could develop formal standards to regulate and limit public intervention in Commission proceedings.[32]

The National Park Service and the U.S. Forest Service, on the other hand, are agencies concerned primarily with land management and planning, not adjudication. The land management statutes which give them authority to carry out Congressional programs do not provide for review of these decisions by the general public. Indeed it is difficult to see how a court could review such decisions absent a special Congressional mandate:

> Adjudication is the ordinary business of the courts and they are well-equipped to oversee an agency's performance of this work. But what can a court do when it is asked to review agency planning? . . . Courts are out

31. See Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608, 617 (2d Cir. 1965), *cert. denied* 384 U.S. 941 (1966).

32. 359 F.2d 994, 1005 (D.C. Cir. 1966).

of their element when they try to pass on the merits of policy judgments.[33]

Since land management statutes do not provide for review, they do not contain the customary safeguards which protect adjudicatory agencies from abuse. While adjudicatory decisions often affect only a narrow class of persons, management and planning decisions have a broader impact. If this Court adopts the Sierra Club argument, every member of the public could be a potential plaintiff to challenge each land management decision.[34]

The Administrative Procedure Act applies to *all* agencies and Section 10(a) refers to all *persons* aggrieved. A Congressional intent that more persons have standing in Federal Power Commission or Federal Communications Commission adjudicatory proceedings does not necessarily reflect an intent that any person should be permitted to obtain judicial review of all final agency decisions—adjudicatory, regulatory and planning. To construe the Administrative Procedure Act as authorizing such suits would alter fundamentally the relationship of federal courts and administrative bodies. If there is a need for a change in the decision-making process in land management, a judicial amendment of Section 10(a) of the Administrative Procedure Act which would affect *all* the federal agencies is not the proper means to this end.

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33. Reich, *The Public and the Nation's Forests*, 50 CALIF. L. REV. 381, 403 (1962).

34. The Public Land Law Review Commission recommended that courts refrain from rethinking land management decisions at the behest of those who were not parties to administrative proceedings. It said: "to minimize the dilatory effects of court involvement, we recommend that in general the availability of judicial review be limited to those parties who participated in the administrative proceedings for which review is sought." ONE THIRD OF THE NATION'S LAND, *supra* note 10, at 257. (All italicized in original.)

If this Court affirms the judgment of the court of appeals it will not leave the public interest in prudent land management unprotected. More effective means than judicial review invoked by a "private attorney general" have been suggested to safeguard this interest.

The Sierra Club urges that standing for conservation organizations in cases such as the one at bar is "critically important to America" (B. 19). This is a gross exaggeration. Judicial review of planning decisions is necessarily limited because Congress has vested broad discretion in planning agencies. Professor Reich has observed:

> [I]t is far from clear that judicial review of a typical Forest Service or Park Service decision would have any importance even if it could be obtained. Courts cannot review the wisdom of agency decisions, but only the limited question of whether a given action was a proper exercise of the power granted by Congress. Given statutory authority as broad as the Multiple Use Act, it is hard to see how a court could overturn as 'unauthorized' any imaginable decision concerning policy or planning for the forests.[35]

What is needed in the area of land management is not more judicial review of *final* agency decisions, but more public participation in the decision-making process itself. Public input before agency decisions are reached does not hinder the effective administration of Congressional programs, yet assures that public opinion will be heard. This is the crux of the Sierra Club's petition:

> If the public interest is to have any meaningful representation in a decision which will have lasting and irreversible consequences for the disposition of public lands, then the Sierra Club or some comparable organization *must have the opportunity to be heard* (B. 34). (Emphasis added.)

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35. Reich, *supra* note 33, at 395-96.

The public already can participate in most agency rulemaking, because such participation is a matter of right under Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553.[36] Public participation in Interior Department rulemaking has often been unavailable because matters concerning "public lands" are exempt from the act's provisions. 5 U.S.C. § 553(a)(2). In recognition of the need for more public voice in land management the Department of the Interior itself has recently provided for public participation in its rulemaking similar to that insured under Section 553.[37]

Congress in enacting the various land management statutes has given the Departments of the Interior and Agriculture broad discretion in managing public lands. In exercising this discretion the administrators were well aware of the Sierra Club's views which were aired repeatedly at public hearings and in correspondence. The administrators rejected the Sierra Club's viewpoint. Contrary to the Sierra Club's entreaty, this Court should not sit as surrogate administrator to oversee this discretion at the request of a self-appointed private attorney general.

If the Sierra Club had suffered a direct or special injury, judicial review would be available. Where it claims no injury to itself, but only asserts its right to champion the

36. This section provides for general notice of the proposed rulemaking by publication in the Federal Register giving the time, place and nature of public rulemaking proceedings, reference to the legal authority under which the rule is proposed, and either the terms or substance of the proposed rule or a description of the subjects and issues involved. After such notice, interested persons have the opportunity to participate through submission of written data, views or arguments.

37. 36 Fed. Reg. 8336-37 (1971).

"public interest," this Court, absent a Congressional mandate, has a duty not to intervene.

At issue in this case is how much of the public lands will be barred to public use and who will make those decisions. Conservationists are not fungible. Some like birds, some like trees, and others like clean water. Some are hunters, some are fishermen, others are boating enthusiasts. Some like skiing, some surfing, and some the wilderness. The Sierra Club presently falls into this last category. It has a narrow bent, but attempts to enfold all conservation, and indeed all the "public interest" under its protective wing.

The citizens of Tulare County feel that the Mineral King development is in the public interest because it will provide badly needed public recreational facilities in a nonwilderness area. They do not want the Sierra Club's "protection." They do not believe it appropriate for this Court to designate any club which is attempting to vindicate its particular corporate philosophy as the "Guardian ad Litem" of the public lands.

II. THERE IS NO STRONG LIKELIHOOD OR REASONABLE CERTAINTY THAT THE SIERRA CLUB WILL PREVAIL ON THE MERITS.

A. The Ninth Circuit Applied the Correct Standard for Preliminary Injunction.

The Ninth Circuit correctly held that the Sierra Club failed to show a "strong likelihood or 'reasonable certainty' " that it would prevail on the merits, and it properly found that it was an abuse of discretion to grant the preliminary injunction.

The standards for determining whether a preliminary injunction should issue are well settled. "The award of a preliminary injunction is an extraordinary remedy, and

will not be granted except upon a clear showing of probable success and possible irreparable injury," *Clairol, Inc. v. Gillette Co.*, 389 F.2d 264, 265 (2d Cir. 1968). A trial judge must also consider the inconvenience that an injunction will cause the opposing party and weigh the public interest. *A Quaker Action Group v. Hickel*, 421 F.2d 1111, 1116 (D.C. Cir. 1969). These guidelines for determining whether to issue a preliminary injunction were summarized in *Virginia Petroleum Jobbers Assn. v. F.P.C.*, 259 F.2d 921 (D.C. Cir. 1958), and are used in all circuits today.[38]

In this case, the Sierra Club argues that the district court was not required to use the *Virginia Petroleum* standards.[39] Citing *Hamilton Watch Co. v. Benrus Watch Co.*,

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38. See, e.g., Intercontinental Container Transport Corp. v. New York Shipping Ass'n., 426 F.2d 884, 886 (2d Cir. 1970); Bayless v. Martine, 430 F.2d 873, 877 (5th Cir. 1970); First-Citizens Bank and Trust Co. v. Camp, 432 F.2d 481, 483 (4th Cir. 1970); Crowther v. Seaborg, 415 F.2d 437, 439 (10th Cir. 1969); Garlock, Inc. v. United Seal, Inc., 404 F.2d 256, 257 (6th Cir. 1968); Nelson v. Miller, 373 F.2d 474, 477 (3d Cir. 1967).

39. Petitioner contends that the standards set out in *Virginia Petroleum* apply only to cases which involve motions for stays of administrative decisions pending appeal, and not to cases involving motions for preliminary injunctions (B. 41-42). The ostensible rationale is that in the former case the stay is sought after the plaintiff has lost on the merits whereas in the latter case the plaintiff has had no opportunity to be heard on the merits. This distinction is a wholly wishful one, quite unsupported by any authority. It is conclusively refuted by the many recent cases which have applied the *Virginia Petroleum* tests to motions for preliminary injunctions. See Intercontinental Container Transport Corp. v. New York Shipping Ass'n., 426 F.2d 884 (2d Cir. 1970); Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319 (2d Cir.), *cert. denied* 394 U.S. 999 (1969); Packard Instr. Co. v. Ans Inc., 416 F.2d 943 (2d Cir. 1969); Garlock, Inc. v. United Seal, Inc., 404 F.2d 256 (6th Cir. 1968). See also Grier v. Bowker, 314 F. Supp. 624 (S.D.N.Y. 1970); Newman v. Holdbeam, Inc., 319 F. Supp. 1389 (S.D.N.Y. 1970).

206 F.2d 738 (2d Cir. 1953), the club contends that since it allegedly showed that irreparable harm was imminent a different rule applies; it was not required to demonstrate that it was likely to prevail on the merits, but merely to raise questions, "going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." 206 F.2d at 740.

In so arguing, the Sierra Club misrepresents the holding of *Hamilton Watch* and misstates the facts of this case. *Hamilton Watch* did *not* hold that proof of probable success may be dispensed with whenever the moving party shows that there is a risk of irreparable harm if the injunction does not issue. What *Hamilton Watch* did hold was that the burden of showing probable success is reduced when "the other elements are present (i.e., the *balance* of hardships tips decidedly toward plaintiff) . . ." 206 F.2d at 740. (Emphasis added.) To tip this balance "decidedly" in petitioner's fav r, it must be shown: (1) that imminent and irreparable harm would result were the injunction denied and (2) that this harm would heavily outweigh the adverse effects upon the defendant and the public from the grant of the injunction.

The Sierra Club could not show that the harm which it would have suffered in the absence of injunctive relief so heavily outweighed that which others would and did suffer as a result of its issuance, that the balance of hardships tipped decidedly in its favor.[40] Yet only upon such a showing may a court require less than a reasonable certainty that the moving party will prevail on the merits. The Ninth Circuit was on firm ground in holding the Sierra Club to the test laid down in *Virginia Petroleum Jobbers*

40. See text accompanying notes 103-105, *infra*.

Assn. v. F.P.C., 259 F.2d 921 (D.C. Cir. 1958), a test which it could not meet.

B. The Secretary of Agriculture Acted Properly.

The Sierra Club has challenged the decision of the Secretary of Agriculture to provide public recreational facilities at Mineral King.

Administrative decisions, including land management decisions,[41] are judicially reviewable in the absence of "clear and convincing evidence" of legislative intent to the contrary. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). However, the Sierra Club has confused the issue of standing with reviewability.[42] The *scope* of review to be given to an agency decision at the instance of a party properly before the court is different from the right to seek review in the first place.

The Sierra Club should heed the concurring opinion in *Barlow v. Collins*, "When agency action is challenged, standing, reviewability and the merits pose discrete, and often complicated issues which can best be resolved by

41. See, e.g., Jones v. Freeman, 400 F.2d 383 (8th Cir. 1968); Udall v. Washington, 398 F.2d 765 (D.C. Cir.), *cert. denied*, 393 U.S. 1017 (1969); McMichael v. United States, 355 F.2d 283 (9th Cir. 1965).

42. In its brief the Sierra Club argues that the Ninth Circuit has misplaced the burden of establishing standing, arguing that "only upon a showing of 'clear and convincing evidence' of contrary legislative intent should the courts restrict access to judicial review" (B. 31). It bases this argument on two cases, *Abbott* and *Data Processing*. In both cases this court referred to a presumption favoring the *reviewability* of agency decision.

In *Abbott* standing was not in issue. This Court was asked to interpret Section 702 of the Administrative Procedure Act which immunizes agency action "committed by law to agency discretion" from judicial review. It emphasized that reviewability of agency decisions is presumed unless there is clear legislative intent to the contrary. Similarly, in *Data Processing* this Court referred to this presumption of reviewability. There is no such presumption of standing.

recognizing and treating them as such." 397 U.S. 159, 170 (1970).

The type of review to be given an administrative decision has been clearly articulated by this Court in its recent decision, *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402 (1971). The first inquiry of the reviewing court will be whether the administrator has acted within the scope of his authority.

Next the court will decide whether the administrator has abused his discretion. An administrator's decision is given a strong presumption of regularity. Although complete immunity from review is disfavored, the scope of judicial review of discretionary administrative decisions is necessarily limited to minimize the conflict between the judicial process and administrative process.[43] "To demand that courts give full review whenever a complainant utters the formula 'abuse of discretion' is to hazard a serious misallocation of judicial resources as well as a stifling of agency and congressional programs."[44]

This Court in *Overton Park* laid down a standard for judicial review of discretionary administrative decisions which strikes a balance between immunity from review and *de novo* review of all decisions:

> Section 706(2)(a) requires a finding that the actual choice made was not 'arbitrary, capricous, an abuse

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43. Professor Jaffe has warned of "the dangerous tendencies of applying relaxed notions of standing without restrictive notions of a judicial discretion such as will allow the court to give paramount weight to administrative discretion of both a procedural and substantive character." Jaffe, *Standing to Secure Judicial Review: Private Actions,* 75 HARV. L. REV. 255, 285 (1961).

44. Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion",* 82 HARV. L. REV. 367, 375 (1968).

> of discretion, or otherwise not in accordance with law.' To make this finding the court must consider *whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.* . . . the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency. 401 U.S. 402, 416 (1971). (Citations omitted and emphasis added.)

Finally, the reviewing court under *Overton Park* will look for procedural errors.

To support the issuance of a preliminary injunction in this case, then, the Sierra Club had to demonstrate a strong likelihood or reasonable certainty that the Secretary of Agriculture exceeded the scope of his authority, abused his statutory discretion or was in procedural error. The Ninth Circuit correctly determined that the Club did not meet this burden.

1. The Secretary Of Agriculture Has Authority To Combine Term And Revocable Permits For Recreational Areas Exceeding 80 Acres.

Under the terms of the preliminary permit issued by the Forest Service to Disney in February, 1966, the Forest Service proposes to issue combined permits to Disney: a 30-year term permit covering approximately 66 acres of land, and a non-exclusive revocable permit covering approximately 250 acres (A. 166). The revocable permit will actually be a special use permit, which is renewable annually and terminable at the discretion of the Forest Service at any time. 36 C.F.R. 251.1.

Congress has authorized both types of permits. The authority of the Secretary of Agriculture to grant annual special use permits (so-called "revocable" permits) lies

in the Act of June 4, 1897, 30 Stat. 34. That act authorizes the Secretary to make "rules and regulations" for the "occupancy and use" of the national forests, 16 U.S.C. § 551, and his authority to grant use permits pursuant to this section has been confirmed by this Court and by the Attorney General. *United States v. Grimaud,* 220 U.S. 506 (1911); 25 Ops. Att'y Gen. 470 (1905). "Several thousand" such revocable permits were granted within the first few years following the 1897 act. Permanent structures, some "costing several million dollars"[45] were built under revocable permits. The Secretary wanted to encourage construction of well built facilities and, in 1914, asked Congress for authority to grant term permits giving the security of tenure necessary to obtain financing:

> There is at the present time some hesitancy on the part of persons who want to use national forest land to construct summer residences, hotels, stores and other structures involving a large expenditure, because of the indefinite tenure of the permits to them which the present law provides for. At the present time, however, there are several thousand such [revocable] permits in use, upon which structures have been erected. In justice to those who desire to construct more substantial improvements, it is believed that the present law should be amended to give persons a better right than the revocable permit now authorized. H.R. Rep. No. 1023, 63d Cong., 2d Sess. 2 (1914).

In 1915 Congress gave the Secretary authority to grant term as well as revocable permits. Act of March 4, 1915, 38 Stat. 1086, 1101, 16 U.S.C. § 497. Term permits were limited to five acres, but there was no acreage limit on

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45. Testimony of Henry S. Graves, Chief Forester, *Hearings on H.R. 13679 Before the House Committee on Agriculture,* 63d Cong., 2d Sess. 306 (1914).

revocable permits. "[The Secretary of Agriculture] can issue terminable permits for 80 acres or 800 acres. The Secretary cannot guarantee certainty of tenure for more than five acres."[46] Five acres were enough to satisfy individuals building summer homes or lodges, but as the need for larger recreational facilities became acute,[47] amendments to the 1915 act increasing the allowable acreage and duration of term permits were sought by the Secretary to make financing more readily available: "The alternatives would be either for the Government itself to go into the hotel, camp and amusement business, which would be practically unthinkable, or else create the conditions under which private individuals, under proper control and legal limitation, could supply the service."[48]

Although the Secretary's request was unheeded for decades, in 1956 Congress responded. It amended the 1915 Act to increase the acreage allowable under term permit to 80 acres and to expand the purposes for which a term permit could be granted to include commercial development.

The Sierra Club interprets the 1956 enlargement of the Secretary's term permit authority under Section 497 as an

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46. Testimony of L. F. Kneipp of the Forest Service, *Hearings on S. 773 Before a Subcommittee of the House Committee on Agriculture*, 72d Cong., 2d Sess., ser P, at 21 (1933). Earlier, in 1931, R. Y. Stuart of the Forest Service stated that for revocable permits there is "no area limitation by law and some are considerably more than 160 acres", *Sundry Hearings on Certain Bills Before the House Committee on Agriculture*, 71st Cong., 3d Sess., ser. V, at 66 (1931).

47. Recreation was the stimulus behind the move to amend the Act of 1915: "[T]he main purpose behind this particular legislation is to permit further development of recreational facilities by commercial activities, which would facilitate the further use and occupancy of the national forests," Rep. Hope, *Hearings* (1933), *supra* note 46, at 6.

48. L. F. Kneipp, *Hearings* (1933), *supra* note 46 at 11.

implied limitation of the Secretary's authority to grant revocable permits. In fact, the only purpose of this amendment was to broaden the Secretary's power to issue term permits; Congress in no way intended to limit his power to grant revocable permits.[49] The House Agriculture Committee report on the 1956 amendment reflected an awareness of existing administrative practices. It indicated that Congress did not want to disturb the Secretary's basic authority to issue revocable permits under the 1897 Act, but rather was expanding his authority to issue term permits under the 1915 Act:

> The Department of Agriculture now has adequate authority to issue revocable permits for all purposes under the act of June 4, 1897 (16 U.S.C. 551). Its authority to issue term permits . . . would be broadened by S.2216. . . . H.R. Rep. No. 2792, 84th Cong., 2d Sess. (1965).

The Sierra Club further contends that Section 497 limits the size of privately financed recreational developments in national forests to 80 acres. It argues that the Secretary has no power to combine term and revocable permits for developments aggregating more than 80 acres. Combining term and revocable permits is a long-established administrative practice of the Department of Agriculture. Since the power to issue term permits was first granted in 1915, the Secretary has often exercised it in conjunction with his power to issue revocable permits. Term permits are

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49. The Secretary already had the power to authorize use of Forest Service land. The amendment was to give him power to grant more secure tenure for such use. This was emphasized years earlier by L. F. Kneipp, *Id.* at 21, "The Secretary of Agriculture now has full authority to do *everything* that will be done under this bill, except to definitely bind the Government for a period of years." (Emphasis added.)

issued for major facilities when definite tenure is needed. A supplemental revocable permit is also issued if more land is required. In 1931 the Forest Service described this practice in testimony before the House Committee on Agriculture:

> Experience has proved that 5 acres is insufficient to permit of the proper development of the most modern types of outdoor camps, hotels, resorts, sanitoria, etc. which, in addition to the principal structures, usually require the related use of lands for the various necessary utilities, recreational services, etc. now regarded as essential to establishments. At present these are provided by the issuance of supplemental terminable permits, which injects an undesirable element of uncertainty of tenure and adds to routine requirements of administration

Again in 1933 in a hearing before the House Committee on Agriculture, the Forest Service testified:

> The only way we can meet the situation is to give them a term permit for the 5 acres upon which the main buildings are situated, definitely securing that part of the project, and to then give them a terminable permit for the remainder of the area, upon which there is no statutory limit. The Secretary of Agriculture can give a terminable permit for as much land of that type as may be necessary.[51]

Congress was advised of this administrative practice repeatedly.[52]

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50. Testimony of Major R. Y. Stuart, *Hearings* (1931), *supra* note 46, at 62.

51. Testimony of L. F. Kneipp, *Hearings* (1933), *supra* note 46, at 15.

52. CONGRESSIONAL REPORTS: S. REP. No. 754, 72d Cong., 1st Sess. (1932). CONGRESSIONAL HEARINGS: *Sundry Hearings on Cer-*

In House hearings in 1947 it was recognized that major facilities in ski resorts would almost always exceed the 5-acre limit on term permits:

> Another type is the ski lifts which are installed under permits on many of our high country winter sports areas. The ski lift itself, extending up the hill, with suitable space at each end for necessary structures to operate it, and a place to sell tickets and what not—and on most of our winter sports areas we need two or three of those . . . and there the aggregate acreage will almost always exceed 5 acres.[53]

In 1956 another Agriculture Department witness explained to the House Committee on Agriculture that winter sports resorts and other developments often were granted permits aggregating not only more than 5 acres but even more than 80 acres:

> We have many, many permits for summer homes, stores, resorts, hotels, all sorts of special uses. I have a list of them here, the type of things which average more than five acres. We have camp and picnic areas, with 17 acres. Those are summer camps . . . fish hatch-

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tain Bills Before the House Agriculture Committee, 71st Cong., 3d Sess., ser. V, at 62 (1931); *Hearings on S.773 Before a Subcommittee of the House Agriculture Committee,* 72d Cong., 2d Sess., ser. P, at 14-15 (1933); *Hearings on H.R. 1809 Before Subcommittee No. 2 of the House Agriculture Committee,* 80th Cong., 1st Sess. 3 (1947). AGRICULTURE DEPARTMENT REPORTS: *Report on S. 4166, 71st Cong., 2d Sess. (1930) to the Chairman, Senate Committee on Agriculture and Forestry* (Apr. 12, 1930); *Report on H.R. 11637, 71st Cong., 2d Sess. (1930) to the Chairman, House Agriculture Committee* (Apr. 21, 1930); *Report on S. 773, 72d Cong., 1st Sess. (1932) to the Chairman, House Agriculture Committee* (Dec. 17, 1932).

53. Testimony of C. M. Granger of the Forest Service, *Hearings Before Subcommittee No. 2 of the House Committee on Agriculture to Facilitate Use and Occupancy of National Forest Lands,* 80th Cong., 1st Sess. at 3 (1947).

> eries, 36 acres; fur farms, 78 acres; mill and factory sites, 48 acres; nurseries, 68 acres; *parks and playgrounds, 88 acres;* reservoirs, 75 acres; *rifle and target ranges, 400 acres; winter sports areas, 400 acres.*[54]

The Ninth Circuit correctly held that the 1956 amendment only increased the Secretary's term permit authority and did not detract from his power to issue revocable permits or to combine term permits and revocable permits:

> It seems apparent, as is obvious to both Senate and House committees that the eighty-acre long-term permit was a necessity to obtain proper financing for substantial permit improvement, while developments of less magnitude and permanency, such as trails, slopes, corrals, could be placed upon land held under revocable permit (A. 229).

This is also the way the Secretary has interpreted the 1956 amendment. He has continued to issue combined permits when necessary, but never grants term permits for over 80 acres. Eighty-four other ski areas have been developed on national forests under this type of arrangement. Many of them have combined term permits for less than 80 acres with revocable permits covering thousands of acres.[55] This well-established administrative practice is entitled to a strong presumption of validity. *Udall v. Tallman,* 380 U.S. 1 (1965).

The Secretary has the authority to issue revocable permits without any limitation on acreage, including the

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54. Testimony of Mr. Crafts of the Forest Service, *Hearings on General Committee Business Before the House Committee on Agriculture,* Vol. I, 44-45 (July 17, 1956). (Emphasis added.)

55. See Appendix, Brief for the United States Ski Association as Amicus Curiae. Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970).

authority to allow the Mineral King development to be built totally under revocable permit. Significantly, two major ski resorts have been built wholly on revocable Forest Service permits.[56] Combination of term and revocable permits merely makes it possible for the developer to obtain construction financing; it does not make the development illegal.

Contrary to the Sierra Club's contention, the Secretary of Agriculture has not combined term and revocable permits to circumvent an 80-acre "limitation." The history of this administrative practice reveals that the Secretary uses term permits only where absolutely necessary:

> The long-established practice of the Department of Agriculture is to restrict the area covered by special-use permits to the minimum consistent with the needs of the applicant. In the great majority of cases, the permitted areas would be greatly below the maximum established by the bill, which would be attained only when absolutely necessary to meet clearly established needs.[57]

In this case the Secretary proposes to issue a term permit, not for 80 acres, but only for about 66 acres because that is all that is needed to cover the major Mineral King facilities.[58] The supplemental permit will cover an area of approximately 250 acres where no structures will be located.

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56. Two ski resorts use public land under revocable special use permit only. Mount Snow in Green Mountain National Forest in New Hampshire represents a $2.9 million investment on 911 acres. Multipor Ski Bowl at Mount Hood National Forest in Oregon lies on 640 acres of public land with improvements of $800,000.

57. *Hearings* (1931), *supra* note 46, at 62.

58. This is not a case where, as the Sierra Club argues (B. 46) "The Secretaries are under pressure to commit public lands to commercial exploitation, both to justify budgetary requirements of their agencies and to please powerful and persuasive applicants for development permits." The Mineral King development was

The 1956 legislation was enacted to stimulate private investment in public recreational facilities in national forests. The Sierra Club must not be allowed to twist it into a device to block the Mineral King recreational area and to close dozens of other ski areas in western United States, virtually ending skiing as a permissible form of outdoor recreation west of Denver.[59]

The Sierra Club, although recognizing the Secretary's authority to issue revocable permits (B. 51) further argues that the revocable permit is invalid because it is neither "revocable" nor "terminable." The foundation for this remarkable argument is not the language of the permit itself—indeed by its very terms it is revocable at the

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contemplated by the Agriculture Department for over 20 years. Stimulus for the development came from the Department itself, which published a request for competitive bids, not from any private developer.

59. Most of the 84 ski areas presently on National Forest land holding combined term and revocable permits would be illegal if Section 497 were given the Sierra Club's strict construction. This was indicated in Department of Agriculture testimony in recent Senate Appropriation hearings:

> Question. Will this suit [Sierra Club v. Morton] have any effect on other facilities authorized by the Forest Service?
>
> Answer. There are 84 recreational facilities authorized in National Forests and based upon permits similar to those under attack in this suit. Depending upon the outcome of this suit, there could be some effect on the permits authorizing these facilities. If the outcome is favorable to the Government, the permits authorizing these facilities will not be affected. If the outcome is unfavorable, then each of these permits would be without authority and, therefore, would be illegal. Seven permits could be covered under existing authority, but the remaining 77 could not. These then would technically be in trespass, the facilities would have to be removed, and the sites restored. New legislation would be necessary to allow the continued occupancy of National Forest land. *Hearings on H.R. 9417 Before a Subcommittee of the Senate Committee on Appropriations,* 92d Cong., 1st Sess. 2922 (1971).

discretion of the Forest Service[60]—but the availability of the Forest Service appeal process to the terminated permittee. Under the Forest Service regulations appeal to the Board of Forest Appeals would be available.

This Board would not, as the Sierra Club argues, test the *grounds* for the decision but would decide only whether the contested decision was "contrary to, or in conflict with, the facts, law or the regulations of the Secretary of Agriculture."[61] The burden of establishing errors or omissions would rest on the complaining party.[62] Since the only protection the regulations afford a special use permittee under a revocable permit is that such permit "may be revoked or cancelled only by the Secretary of Agriculture or by an officer of the Forest Service superior in rank to the one by whom it was isued,"[63] such a superior officer could revoke the permit for any reason and still be upheld by the Board.

These regulations and appeal procedures do not in any way detract from the Forest Service's express contractual right to revoke the proposed permit. If the Sierra Club's position were sound, since all denials of permits are appealable, *no* Forest Service permit would ever be revocable. This is clearly unreasonable.

The Sierra Club further questions whether revocable permits to use land on which permanent structures are built are in fact revocable. Expensive improvements have been

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60. Section 15 of the proposed permit (A. 24) deals with termination stating "this permit may be terminated upon breach of any of the conditions herein or at the discretion of the Regional Forester or the Chief, Forest Service." A permit "terminable at the discretion" of a party is revocable at will.

61. Forest Service Regulations, 36 C.F.R. § 211.21.

62. *Id.* § 211.24.

63. *Id.* § 251.1.

erected on Forest Service land under revocable permits for years. This practice was cited as early as 1914 by the Secretary of Agriculture who wrote that "several thousand" revocable permits were in use under which structures had been built.[64]

In 1930 Secretary of Agriculture Hyde noted:

> There has also been a consistent increase in the quality and value of the improvements constructed on these lands [National Forests] under the permits issued by this Department. Some of the hotels and resorts constructed under special-use permit represent investments in excess of $100,000, and many individual summer homes represent investments of $5,000. *Other developments are proportionately permanent and expensive.*[65]

At the present time there are two ski resorts built entirely under revocable Forest Service permits.[66] The fact that permanent or expensive structures are built under a revocable special use permit does not destroy the power of the Forest Service to revoke the permit in its discretion.

In this particular case, contrary to the Sierra Club's allegations, *no* permanent structures will be built at Mineral King under the proposed revocable permit. The garage and the ski lift towers will both be erected under the term permit. The revocable permit will include ski lift clearing, ski runs, and service road.[67] The proposed permits are in fact "terminable" and "revocable."

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64. H.R. Rep. No. 1023, 63d Cong., 2d Sess. 2 (1914).

65. *Agriculture Department Report on S. 5604,* 71st Cong., 3d Sess. to the Chairman, Senate Committee on Agriculture and Forestry, Jan. 29, 1931. (Emphasis added.)

66. See note 56, *supra.*

67. See note 6, *supra.*

2. The Secretary Of Agriculture Did Not Abuse His Discretion In Approving Public Outdoor Recreation In Sequoia National Game Refuge.

The Sierra Club contends that the Secretary of Agriculture abused his discretion when he approved of the Mineral King recreational area in Sequoia National Game Refuge. Under *Overton Park* this decision is entitled to a strong presumption of regularity and will not be overturned unless the Secretary failed to consider all relevant factors or his decision was clearly erroneous.

Section 6 of the 1926 legislation expanding Sequoia National Park designated Mineral King as a game refuge and prohibited "the hunting, trapping, killing or capturing of birds and game or other wild animals" at Mineral King except under regulations of the Secretary of Agriculture. 44 Stat. 818, 821, 16 U.S.C. § 688. Specifically contemplating multiple-use management of Mineral King the act continues:

> *Provided further,* That the lands included in said game refuge shall continue to be parts of the Sequoia National Forest and nothing contained in this section shall prevent the Secretary of Agriculture from permitting other uses of said lands under and in conformity with the laws and rules and regulations applicable thereto so far as may be consistent with the purposes for which said game refuge is established.

The purposes for which the game refuge was established were stated in the act:

> *Provided,* That it is the purpose of this section *to protect from trespass the public lands* of the United States *and the game animals* which may be thereon, and not to interfere with the operation of the local game laws as affecting private or State lands. (Emphasis added.)

In 1924 hearings the Chief of the Forest Service explained these purposes, stating that hunting should be prohibited at Mineral King for three reasons:

—to increase the deer herds,
—to prevent poaching across park boundaries, and
—to keep the people who use the area for recreation from being shot.

He said:

> The third reason is that in the vicinity of Mineral King is quite an intensely developed recreational area under national forest administration. There are a good many campers in there. There are a good many summer home permits held by people who have constructed summer cabins and who take their families up there for the entire season, and on account of that intensive recreational development we think it is preferable to exclude hunting from the region. *Hearings on H.R. 4095 Before the House Public Lands Committee,* 68th Cong., 1st Sess. 24 (1924).

The Secretary of Agriculture Considered All Relevant Factors.

There is scant likelihood that the Sierra Club could prevail on its assertion that the Secretary of Agriculture abused his discretion by deciding to permit outdoor recreation at Mineral King. This was no hasty decision. Development of a ski area has been under consideration for over twenty years. In 1949 the Secretary established the Mineral King Recreation Area and sought private capital for the construction of facilities for skiing. In 1965 the Secretary again sought capital for construction of public recreational facilities at Mineral King.

The Secretary scrutinized every possible effect of recreational use on the Mineral King terrain and game be-

fore approving the master plan in February, 1969. Disney itself conducted extensive studies and surveys which were available to the Secretary including:

> [R]eports on ski area and resort planning; low and high altitude vertical photography and topographic mapping of Mineral King; detailed data on various rock and soil types, and geological conditions in the Village and proposed parking area; studies on sanitation, waste disposal, water systems, meteorology and avalanche control; studies on transportation systems to bar automobile traffic from the Mineral King Valley; and other substantial research and planning reports (A. 177).

Preparation of a master plan supported by such extensive investigations cost Disney over $750,000 (A. 177).

Within the Forest Service, the Division of Recreation consulted with the Range and Wildlife Management Division long before the master plan was prepared and approved (A. 130). In 1967 the Range and Wildlife Management Division was critical of some ecological aspects of the proposal. However it recognized "it is imperative to retain much of the original basic ecological uniqueness of this basin and that this is possible with careful, thoughtful planning" (A. 131).

The Secretary also considered the possible impact on fish (A. 129) and game (A. 142, 143). In announcing the master plan, the Regional Forester emphasized:

> Our goal is to provide a needed public service so that the scenic, aesthetic and recreational resources of Mineral King can be enjoyed by the American people as part of their heritage. At the same time, we intend to work with the Disney organization to insure that the development can be accomplished without *substantial impairment or permanent, undesirable, ecological impact* (T.R. 52). (Emphasis added.)

One of the road surveys summarized the consideration of all aspects of the Mineral King development:

> Outdoor recreation would be the primary benefit from the Mineral King development. With careful planning and supervision, soil losses would be minimal. Very little timber volume is within the right of way. No fishery resources are directly involved, and the highway parallels deer migration routes. Anticipated impact on fish and wildlife resources are minimal. . . . The proposed highway, as presently planned, would have no major adverse effects on the Sequoia National Forest and would make available a greatly enlarged recreation resources base to meet public needs.[68]

There Is No Clear Error of Judgment.

Federal land management statutes as a whole reflect a Congressional desire that public lands be administered to promote harmonious and coordinated management of their many resources. This is the spirit of the Multiple Use-Sustained Yield Act of 1960, 74 Stat. 215, 16 U.S.C. §§ 528-31, which catalogues the permissible uses of National Forest land: "outdoor recreation, range, timber, watershed, and wildlife and fish purposes," and of the act which declared Mineral King a game refuge, while encouraging its use for other compatible purposes. 44 Stat. 821, 16 U.S.C. § 688.

Recreation is a legitimate use of national forest land. It cannot be inconsistent *per se* with a game refuge[69]; all national parks are also game refuges and recreational use of such areas is encouraged. Winter sports resorts—

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68. Forest Service, *Mineral King Highway Impact Survey Report, Stage I*, April 1968 at 26.

69. 16 U.S.C. § 460k, 76 Stat. 653, specifically permits recreational use of areas within the National Wildlife Refuge System compatible with the purposes for which such areas were established.

ski areas—have been built entirely in national parks.[70] There is nothing about the designation of an area as a game refuge which subjects it to use restrictions more stringent than those applied in national parks.

Since recreational use of a game refuge is not *per se* arbitrary or capricious, it was improper for the trial court to enjoin recreational use of Mineral King unless the proposed development is so wholly inconsistent with the purpose of the Sequoia National Game Refuge as to overcome the strong presumption of regularity to which the Secretary's decision is entitled. The purpose of the Sequoia Game Refuge was to protect the game animals, primarily the herds of deer, to prevent poaching in the adjacent national park, and to protect vacationers who use the area. Since Mineral King is not a part of the park itself, Congress at least wanted to "perpetuate the protection now offered by the National Park."[71]

At present controlled hunting under state supervision is required to control the animal overpopulation in Mineral King. In 1926 when the Sequoia National Game Refuge was established the animals thought to need protection were bear and deer. Wildlife refuges, as tools to protect game, have now fallen out of grace with wildlife managers. On the Sequoia National Game Refuge, as on most other game refuges, controlled hunts are now allowed. Under the regulations of the California Department of Fish and Game both deer and bear are hunted in Mineral King today. The game management problem in Mineral King is not one of

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70. *E.g.*, the Badger Pass ski area is entirely within Yosemite National Park.

71. *Hearings on H.R. 9387 before the House Committee on Public Lands*, 69th Cong., 1st Sess. 58 (1926).

preserving the last remnants of vanishing species, but rather one of controlling population so that the animals will not, through overgrazing, destroy their habitat.[72]

The record shows the Secretary's consideration of all relevant factors, including the impact of Mineral King on fish and game. It was neither arbitrary nor clearly erroneous for the Secretary of Agriculture to approve of the Mineral King development knowing of the overpopulation of animals in the refuge and the urgent need for outdoor recreational sites. The Secretary merely followed the statutory mandate for multiple-use management to insure the balanced use of public lands. This decision is entitled to a strong presumption of validity. There was more than

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72. The area is now managed under a Master Cooperative Agreement between the Forest Service and the California Department of Fish and Game dated April 15, 1953, Forest Service Manual, § 2611.1, R-5, Supplement No. 37, amended 1964, and a Memorandum of Understanding Covering the Sequoia National Game Refuge, executed by the National Park Service and the Forest Service in October, 1965, and by the California Fish and Game Commission and the California Department of Fish and Game in January, 1966. The Memorandum of Understanding provides in part:

> WHEREAS, the investigations made by the Department, the Forest Service and the Park Service have shown that the deer population of the Refuge has increased to a level where these animals have caused damage to their range and depletion of valuable native species of vegetation on the adjoining Sequoia National Park and
>
> WHEREAS, there has been need to authorize and hold special deer hunts on the Refuge in order to reduce the deer population to a level in balance with the habitat, and there will continue to be a need to authorize deer hunting in order to remove surplus animals, and . . .
>
> WHEREAS, investigations made by the Department, the Forest Service, and the Park Service have shown that the bear population within the Refuge has increased to a level where these animals have caused damage to both Federal and private property within and adjacent to the Refuge and that there exists a need to control the number of bears within the Refuge . . . .

enough evidence to support the Ninth Circuit's finding that the Sierra Club was not likely to succeed on this issue: "We find no substance in this argument" (A. 234).

3. The Secretary of Agriculture Was Not Required to Make a Formal Finding.

The Sierra Club cites one alleged procedural error by the Secretary of Agriculture. It claims he has neglected to make a finding that recreation at Mineral King is consistent with the Sequoia National Game Refuge and argues that "This failure was an abuse of discretion" (B. 65).

This argument is similar to the one advanced by the plaintiffs in *Overton Park*. Plaintiffs there alleged that a formal finding was required by the Secretary of Transportation that there were no "feasible and prudent" alternatives to the selected road route. This Court in rejecting that contention held:

> Undoubtedly review of the Secretary's action is hampered by his failure to make such findings, but absence of formal findings does not necessarily require that the case be remanded to the Secretary. Neither the Department of Transportation Act nor the Federal Aid to Highways Act requires such formal findings.... And, although formal findings may be required in some cases in the absence of statutory directives when the nature of agency action is ambiguous, *these situations are rare*. Plainly, there is no ambiguity here, the Secretary has approved the construction of I-40 through Overton Park and has approved a specific design for the project. 401 U.S. 402, 417 (1971). (Citations omitted and emphasis added.)

In this case the Secretary of Agriculture was authorized to use game refuge lands for purposes "consistent with the purposes for which the game refuge is established," 16 U.S.C. § 688, but the statute requires no formal finding.

There is also no ambiguity in the Secretary's action; he has approved the Mineral King master plan and proposes to issue a 30 year permit to Disney. As in *Overton Park* it is not an abuse of discretion for him to act without a formal finding.

C. The Secretary of the Interior Acted Properly.

The Sierra Club has also challenged two administrative decisions of the Secretary of the Interior—the approval of a transmission line and of a road traversing Sequoia National Park to permit public enjoyment of Mineral King.

1. The Secretary of the Interior has authority to permit the construction of a power distribution line to serve Mineral King.

The Sierra Club contends that the 1926 legislation expanding Sequoia National Park prohibits the Secretary of the Interior from granting any right-of-way for electrical transmission and distribution lines through Sequoia National Park without first obtaining Congressional approval. Act of July 3, 1926, 44 Stat. 820, 16 U.S.C. § 45c.[73] This interpretation of Section 45c is untenable.

The purpose of Section 45c was to give the lands added to Sequoia National Park in 1926 the same protection that Congress previously had given all other national park lands against Federal Power Commission licensing of hydroelectric power generation facilities and associated primary transmission lines within their limits.

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73. The portion of Section 45c in issue contains the following prohibition:

> *Provided*, That no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits of said park as constituted by said sections, shall be granted or made without specific authority of Congress.

The Secretary of the Interior has had specific authority since 1901 to grant revocable rights-of-way through Sequoia National Park for electrical plants, poles and lines.[74] In 1911 Congress also gave the Secretary power to grant term rights-of-way.[75]

In 1913 one of the most dramatic conservation battles of the century culminated with the passage of the Raker Act, Act of December 19, 1913, 38 Stat. 242, authorizing the City of San Francisco to construct Hetch Hetchy Dam and Reservoir within Yosemite National Park on the Tuolumne River. The memory of the Hetch Hetchy fight had not dimmed when, in 1920, the Federal Power Act[76] was passed, giving the Federal Power Commission authority to license hydro-electric power development projects on the public lands. This act was "the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources

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74. "The Secretary of the Interior is authorized and empowered under general regulations to be fixed by him to permit the use of rights-of-way through the public lands, forest, and other reservations of the United States, and the Yosemite and Sequoia National Parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes. . . ." Act of February 15, 1901, 31 Stat. 790, 16 U.S.C. § 79.

75. "The head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights-of-way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power. . . .", Act of March 4, 1911, 36 Stat. 1253, 16 U.S.C. § 5.

76. Act of June 10, 1920, 41 Stat. 1063 (1920). At that time the act was called the "Federal Water Power Act." The name was changed to the "Federal Power Act" in 1935. 49 Stat. 863.

of the nation, insofar as it was in the reach of the federal power to do so. . . ." *First Iowa Hydro-Electric Co-op v. Federal Power Commission,* 328 U.S. 152, 180 (1946).

The power of the Secretary of the Interior to grant rights-of-way under the 1901 and 1911 statutes was superseded by the Federal Power Act as to projects for the generation and transmission of hydro-electric power.[77] One year later Congress took some of this power away from its newly created Commission as well, protecting the national parks and monuments from hydro-electric intrusion by providing:

> [N]o permit, license, lease or authorization for dams, conduits, reservoirs, power houses, transmission lines or other works for storage or carriage of water, or for the development, transmission, or utilization of power, within the limits as constituted March 3, 1921, of any national park or national monument shall be granted or made without specific authority of Congress. 41 Stat. 1353, 16 U.S.C. § 797a (Supp. 1971).[78]

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77. The Federal Power Act created the Federal Power Commission and gave it jurisdiction to license "dams, water conduits, reservoirs, power houses, transmission lines or other project works . . .". Act of June 10, 1920, 16 U.S.C. § 797(e). Section 796(11) defines "project" as the:

> [c]omplete unit of improvement or development consisting of a power house, all water conduits, all dams and apurtenant works and structures . . . the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system. . . .

78. The reason for this amendment was explained by Representative Esch in introducing the bill. He testified:

> [T]he object of the bill is to modify the Federal Water Power Act so as to eliminate from its provisions national parks and monuments. When the Act was originally passed we supposed we had sufficiently safeguarded national parks and monuments so that there would not be constructed therein any water power or reclamation projects. However, the President was in doubt as to whether he would sign the bill which was

As a concession to the power interests this amendment applied only to national parks or national monuments "as constituted March 3, 1921."[79] Its applicability to new parks or additions to parks was to be decided by Congress at a later time:

> Should hereafter new parks or monuments be created by act of Congress, opportunity should be afforded Congress to declare whether or not such new parks or monuments should be subject to water power development, leaving to Congress instead of to the Federal Power Commission the right to say, or to what extent, such new national parks or monuments, or additions to existing parks or monuments, should be opened to water power development.[80]

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presented to him on the fourth day of June, the day before we adjourned. He referred the bill to the Secretaries of the Interior, War and Agriculture. The Secretary of the Interior had great doubts as to the policy of giving the commission control over the national parks and monuments in the matter of water power development. Senator Jones, Chairman of the Committee on Commerce and Senator Walsh of Montana, called upon the Secretary and conferred with him regarding the signing of the bill. The Secretary conferred with Secretary Underwood and the Majority Leader (Mr. Mondell) and an understanding was reached whereby the bill was to be introduced at this session eliminating the parks and monuments from the operation of the Federal Power Act, and this bill carries out this understanding. 60 CONG. REC. 4204 (1921).

See also, H. R. REP. No. 1299, 66th Cong., 3d Sess. 3 (1921).

79. In 1921 John B. Payne, Secretary of the Interior wrote to the House Committee on Interstate and Foreign Commerce agreeing to so limit the application of the Act:

> I saw no objection to limiting the proposed amendment to the power act . . . to existing parks and monuments. Several weeks ago a representative of the power interests called on me and stated that it would eliminate objection from those interests if the words "as now constituted" would be inserted. . . ., H.R. REP. No. 1299, 66th Cong., 3d Sess. 3 (1921).

80. H.R. REP. No. 1299, 66th Cong., 3d Sess. 2 (1921). In 1935 Congress redefined the jurisdiction of the Federal Power Commission to exclude all existing and future national parks and monu-

Sequoia National Park was expanded in 1926 to protect the Kern River basin from future development for power purposes.[81] Act of July 3, 1926, 44 Stat. 818. Since the 1921 amendment to the Federal Power Act applied only to *existing* national parks, its prohibition was incorporated into the 1926 act to "prohibit the development of hydro-electric power in the . . . enlarged park."[82] Thus, all Sequoia National Park was insulated from the threat of Federal Power Commission licensing of dams and power plants within its boundaries.

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ments. Act of Aug. 26, 1935, 49 Stat. 838, 16 U.S.C. § 796(2). In the period between 1920 and 1935, however, Congress was obliged to decide each time it added land to the national park system whether the Federal Power Commission licensing authority should extend to the new park area.

81. W. B. Greeley, Chief of the Forest Service testified:

> This proposed addition embraces some 600,000 acres. The striking topographic features of that area are three great canyons, chiseled out of the Sierras. These great canyons, Kern River and the South and Middle Forks of Kings River, are bound to be the principal routes of travel. One of the greatest attractions will be the canyons themselves, with their remarkable variety of topography.
>
> You cannot admit power development in canyons of that character, with artificial reservoirs and conduits, the erection of transmission lines, power dams, pipe lines, and all the rest of it, without largely destroying its natural character. *Hearings before the House Committee on Public Lands on H.R. 7452 to Add Certain Lands To Sequoia National Park,* 67th Cong., 2d Sess. 12 (1921).

Because of pending power applications, the area surrounding the Kings River, first proposed for inclusion in Sequoia National Park was not preserved until 1940 when it became Kings Canyon National Park. Act of March 4, 1940, 16 U.S.C. § 80. See H.R. REP. No. 583, 67th Cong., 2d Sess. 3 (1922): "The city of Los Angeles has on file with the Federal Power Commission applications for six power sites within this proposed new area. The San Joaquin Light and Power Corporation has applied for two sites." See also *Hearings Before the House Committee on Public Lands on H.R. 4095,* 68th Cong., 1st Sess. 2, 19, 21, 39, 87 (1924).

82. H. R. REP. No. 583, 67th Cong., 2d Sess. 2 (1922). See also *Hearings* (1921), *supra* note 81, at 9, 10, 14, 15, 23, 24.

Though the Federal Power Act superseded the Acts of 1901 and 1911 in part, it did not take away all of the Secretary of the Interior's power to license distribution and transmission lines over public lands. In *Pacific Power and Light Company v. Federal Power Commission*, 184 F.2d 272, 274-75 (D.C. Cir. 1950), the court held that the Federal Power Act restricted the Secretary's authority only over hydro-electric power projects. The court stated:

> [T]he purpose of Congress appears to have been to place in one agency authority over the development of the hydro-electric resources owned or controlled by the National Government, and would encompass the auxiliary facilities which are parts of those projects. But such a purpose would not necessarily encompass transmission lines or other facilities which are not parts of such projects. There would seem to be no necessity, for example, under the compulsion of that purpose, to take from the Secretary of the Interior authority to determine the use of public lands within his jurisdiction for a transmission line which is not a part of a hydro-electric project. Reservoirs, power houses and transmission lines merely as such were not the considerations which led Congress to pass the Act. The concern of Congress was in the development of water resources. . . . [U]nless the nature, purpose and function of the line is such as that it is a part of a power project, it does not fall within the statutory definitions which establish the authority of the Commission, and is not to be forcibly enveloped in the statutory language by the compulsion of a congressional purpose inadequately expressed.

Both the Secretary of the Interior and the Secretary of Agriculture have interpreted their authority under the 1901 and 1911 acts in this way. Both have promulgated regulations for the issuance of power line permits not falling

within the regulatory authority of the Federal Power Commission.[83]

There is no basis for the Sierra Club's contention that Section 45c requires Congressional authorization of all distribution or "high voltage transmission lines" (B. 80) in Sequoia National Park. If this restrictive interpretation were correct, Congressional approval of all power lines in all national parks and monuments as constituted in 1921 would be required under the 1921 Act, 16 U.S.C. § 797a. The Ninth Circuit recognized the "unlikely intention to require an act of Congress for each electrical line within the park" (A. 232).

The Secretary's administrative interpretation of Section 45c is reasonable and this Court should defer to it. "When faced with the problem of statutory construction, this Court

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83. A regulation of the Secretary of Interior states:

> Applications for hydroelectric power plant sites or rights-of-way from main or primary hydroelectric power transmission lines must be made to the Federal Power Commission, Washington, D.C. under the Act of June 10, 1920, as amended. Rights-of-way for transmission lines which are not primary lines must be secured under the Act of February 15, 1901, or the Act of March 4, 1911. 45 C.F.R. § 2234.4-1(3).

The Secretary of Agriculture has a similar regulation. 36 C.F.R. § 251.52 authorizes the Chief of the Forest Service to grant easements for certain types of transmission lines. Section 251.50 defines these transmission lines as follows:

> Transmission lines means the poles, towers, wires, insulators and all other structures, equipment, appliances and other facilities erected or to be erected when:
>
> (1) The transmitted energy is generated from other than water power,
>
> (2) The transmission line classifies as a *non-primary line* under the provisions of the Federal Power Act . . . because it does not transmit power from a water power plant or appurtenant works to a point of junction with the distribution system or with the inter-connected primary transmission system. (Emphasis added.)

shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall v. Tallman,* 380 U.S. 1, 15 (1965).

Application of the 1921 prohibition on F.P.C. licensing to the land added to Sequoia National Park in 1926 was the sole purpose of Section 45c. Congress did not intend to repeal the authority of the Secretary of the Interior to grant rights-of-way under the 1901 and 1911 Acts for distribution and transmission lines other than hydro-electric projects and primary transmission lines.[84] The legislative history, administrative practice and judicial interpretation of Section 45c confirm this. The proposed Mineral King power line is neither a hydro-electric project nor a primary transmission line. Therefore, this Court should affirm the decision of the court of appeals which found it "unlikely that the appellee could prevail as to such a contention" (A. 231).

In addition to arguing that no power line may be built across Sequoia National Park without specific Congressional approval, the Sierra Club argues that ever such electrical line must serve a park purpose.

Congress did not restrict the Secretary to granting term permits only for lines serving park purposes. The Act of 1911, 16 U.S.C. § 5, expressly authorizes term rights-of-way "within or *through* any national park" so that such lines may serve areas *outside* parks. The legislative history of

84. Congressional authorization of a power project pursuant to Section 45c has been required only once. In 1963, in connection with Federal Power Commission re-licensing of its Kaweah No. 3 Project, the Southern California Edison Company obtained legislation specifically authorizing the Secretary of the Interior to issue a permit for the continued operation, maintenance and use of hydro-electric facilities within Sequoia National Park. 77 Stat. 70 (1963). That project includes water storage reservoirs at Mineral King and a flume crossing Sequoia National Park.

that section confirms that Congress intended to broaden the authority of the Secretary of the Interior and the Secretary of Agriculture to permit power lines to be built on public lands by giving the permittees more certain tenure.[85]

The Sierra Club contends that the National Park Service Act of 1916, 39 Stat. 535, 16 U.S.C. § 1, amended the Secretary's authority to grant term rights-of-way by requiring that every such right-of-way serve a park purpose. That act allows the Secretary to "promote and regulate the use" of national parks by "such means and measures as conform to the fundamental purpose of said parks." 16 U.S.C. § 1. These purposes are recreation and preservation. There is no indication that the proposed power line will not *conform* to park purposes. Contrary to the Sierra Club's contention, Section 1 does not require that every line *serve* a park purpose.

The Sierra Club also argues that the 1916 act limits the Secretary's authority to grant revocable rights-of-way for power lines in Sequoia National Park under 16 U.S.C. § 79. However, 16 U.S.C. § 4 expressly states that Section 1 *does not* "affect or modify" Section 79.

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85. "The committee finds that under the existing law and regulations the only right of way that can be obtained for electrical lines for the transmission of power across the public domain and national forests is a temporary revocable permit issued by the Secretaries of the Interior and Agriculture. That under the present conditions, in many cases, it is impossible for companies interested in the development of power outside of the limits of national forests to successfully raise the necessary money for the construction work where the tenure of the right of way across public lands and national forests is subject at any time to be revoked by an administrative officer of the Government. The committee is unanimously of the opinion that the legislation called for in the bill should receive immediate and favorable consideration." SEN. REP. No. 967, 61st Cong., 3d Sess. 1 (1911).

2. The Secretary Of The Interior Has Authority To Permit The State Of California To Improve The Mineral King Access Road.

The Sierra Club erroneously contends that the Secretary of the Interior has threatened to exceed his statutory authority by permitting the State of California to construct a road across Sequoia National Park to serve the public travelling to recreation lands in Sequoia National Forest.

The Secretary of the Interior has express authority over national park roads under the Act of April 9, 1924, 43 Stat. 90, 16 U.S.C. § 8:

> The Secretary of the Interior, in his administration of the National Park Service, is authorized to construct, reconstruct, and improve roads and trails, inclusive of necessary bridges, in the national parks and monuments under the jurisdiction of the Department of the Interior.

In addition to this express power, the authority of the Secretary of the Interior to grant road permits is inherent in the delegation by Congress to the Secretary of the power to "regulate the use of the federal areas known as national parks." 16 U.S.C. § 1. For decades the Secretary of the Interior has exercised this land management power by permitting construction of roads traversing national parks.[86]

These two sections give the Secretary broad power over road building in national parks. Nevertheless, the Sierra Club argues that to permit the State of California to im-

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86. Examples of such roadbuilding include the Blue Ridge Parkway connecting Shenandoah National Park and the Great Smoky Mountain National Park, the Zion-Mount Carmel road and tunnel, the Wawona tunnel and road in Yosemite, the Cape Royal road in the Grand Canyon, the Paradise Valley and Yakima Park highway in Mount Rainier, the Sylvan Pass road in Yellowstone, and the Going-to-the-Sun road in Glacier. See generally, Ise, Our National Park Policy 326-28 (1961).

prove the existing county road crossing the west side of Sequoia National Park would be illegal because under Section 8 the Secretary *alone* is authorized to construct such roads. Such a restrictive interpretation is unwarranted.

This case does not involve delegation by the Secretary of the Interior of any quasi-legislative or judicial function.[87] Road building in national parks is within the authority of the Secretary of the Interior, and the means by which this is accomplished is also for him to determine. It is within the Secretary's power to authorize the state to build a road which he himself could have constructed.

Section 8, designed to broaden the Secretary's power to build and improve roads in national parks, should not be construed to prohibit federal cooperation with state or local authorities.[88] The weakness of the Sierra Club's argument is especially apparent in this case. Since 1885, Tulare County has owned and maintained the Mineral King road.[89] The

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87. While an administrative body cannot delegate these types of functions, it can delegate the performance of administrative and ministerial duties. See Krug v. Lincoln Nat'l Life Ins. Co., 245 F.2d 848 (5th Cir. 1957).

88. The Secretary himself has tried to promote federal-state cooperation to further recreational interests. He has adopted a regulation in connection with his management of public lands generally. The objective of the regulation is "To assure that persons wishing to use lands have access to them and that outdoor recreation use does not damage the resources," 43 C.F.R. § 6250.0-2. The Department's policy is stated in Section 6250.0-6: "In cooperation with State and local governments and private individuals and associations, the Bureau will endeavor to provide access for public use and enjoyment of lands with outdoor recreation values."

89. The Mineral King Road was conveyed to Tulare County October 7, 1885. The deed in Volume 12 of Deeds in the office of the Tulare County Recorder reads as follows:

> Know all men by these presents, that I, Robert McKee of the County of Tulare, State of California, for and in consideration of $1,573.30, the receipt whereof is hereby acknowl-

portion which is within Sequoia National Park is maintained by the county with the approval of the Department of the Interior. The road has been improved and its alignment changed from time to time since Sequoia National Park was created in 1890. The Sierra Club argues that the Secretary has incorrectly interpreted his authority and has unlawfully permitted county maintenance of the Mineral King road for the last eighty-one years. This is an unreasonable interpretation of Section 8.

The Sierra Club further argues that every park road must serve a park purpose. This too is untenable. The only statutory limitation on the broad Congressional delegation of managerial power over road building to the Secretary of the Interior is the general admonition of 16 U.S.C. § 1 which requires that the Park Service:

> [P]romote and regulate the use of [National Parks] . . . by such means and measures as conform to the fundamental purpose of said parks . . . which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

The Secretary of the Interior in authorizing the Mineral King road has exercised the power to *regulate* the use of a federal area — the national park land on which the road will be constructed. Under 16 U.S.C. § 1 the road must

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edged, do grant to the County of Tulare in the State of California, bounded and described as follows: All that certain Toll Road known as the Mineral King Wagon and Toll Road, together with the Franchise and all and singular the appurtenances thereto belonging or in anywise appertaining.

It has never been conveyed to the United States.

conform to the fundamental purpose of the park. It does not, however, require that every measure *serve* a park purpose. The only limitation on the Secretary's broad authority over roads in national parks is that roads cannot be built either without regard to conserving national and historic objects and wildlife within the park, or in a way which would impair the enjoyment of the park for future generations. The Secretary acted within the scope of his authority when he approved the construction of the road. The Ninth Circuit's unanimous decision on this issue, "We cannot find in the appellee's contentions concerning this proposed road any degree of substantiality" (A. 231), should be affirmed.

3. The Secretary Of The Interior Did Not Abuse His Discretion In Approving The Mineral King Road.

A determination that the Secretary has acted within the scope of his statutory delegated authority does not end this Court's review of his decision. The Sierra Club has alleged that the Secretary of the Interior's decision to approve road construction across Sequoia National Park was also an abuse of discretion.

Under *Overton Park* the Secretary's decision must stand unless he has failed to consider all relevant factors or has made a clear error of judgment. The Sierra Club has not shown a substantial likelihood that the Secretary of the Interior did either.

The Secretary of the Interior's Approval of the Mineral King Road Was Based Upon a Consideration of All Relevant Factors.

An agency's decision must be based upon a consideration of all relevant factors. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). These factors are contained in

the statutes which give administrative agencies their authority to act:

> Statutes bestowing discretion on a federal official are not passed in vacuum. They may contemplate a broad range of permissible decisions, but the outer boundaries of the decision-making process are circumscribed by the statutory framework administered by the agency. . . . Decisions may not be based upon factors irrelevant to the purposes of the statutory scheme, nor may factors relevant to the express congressional purpose be totally ignored. *Sierra Club v. Hardin,* 325 F. Supp. 99, 112-13 (D. Alaska 1971)

Thus, in *Scenic Hudson Preservation Conference v. F.P.C.,* 354 F.2d 608 (2d Cir. 1965), the relevant statute, the Federal Power Act, required the commission to adopt the project "best adapted to a comprehensive plan for improving or developing a waterway."[90] In *Overton Park* the Secretary of Transportation under the Transportation Act could not build a highway through a park unless there was "no feasible or prudent alternative."[91]

The relevant statute in the case at bar is 16 U.S.C. § 1, requiring the Secretary of the Interior in regulating the use of federal areas to employ only those means and measures which conform to the purpose of such parks. If the Secretary had ignored this directive when he approved the Mineral King road, he would have abused his statutory discretion, but as the Ninth Circuit noted, "The record shows a great deal of concern in its planning for preservation of aesthetic and ecological values" (A. 230).

The Secretary of the Interior considered the Mineral King road in detail when he surveyed Sequoia National

90. 354 F.2d at 614 (2d Cir. 1965).

91. 401 U.S. 402, 405 (1971).

Park roadless areas pursuant to the Wilderness Act of 1964, Act of Sept. 3, 1964, 78 Stat. 890, 16 U.S.C. §§ 1131-36. At public hearings in 1966 on the Park Service wilderness proposal for the park, the Mineral King road was hotly debated for two days. The Sierra Club urged wilderness boundaries which would have blocked any improvement of Mineral King access.[92] The club, however, has failed to mention the close relationship of the Secretary's decision to permit improvement of the Mineral King road and his recommendation that nearly three quarters of a million acres of Sequoia and Kings Canyon National Parks be set aside as wilderness.[93]

The Secretary of the Interior considered at least three alternate routes (A. 61, 140) before consenting to the state-approved route. One of the alternates would have involved massive tunneling across Sequoia National Park. Though it involved construction of a tunnel, there was no evidence that its ecological impact on the park would have been any less than that of the route chosen. The second would have traversed the surface of the park, but the Forest Service found it was inferior to the proposed route in all respects.[94] The final alternative involved a long tunnel passing through national forest rather than national park land. It was routed through such a remote and inaccessible region of the Sierra that its estimated cost of construction was $78 million (A.

92. H.R. Doc. No. 92-102, 92d Cong., 1st Sess. 30 (1971).

93. *Id.* at iii.

94. "In our judgment, the Clarkeson proposed location and design would result in a more costly highway, a less esthetic highway, a more positive barrier to wildlife movement, and would violate many of the concepts we have attempted to use in making this highway an integral part of the terrain it traverses." *Proposed Road to Mineral King,* Memorandum to the Chief, U.S. Forest Service from the Director of Engineering, Oct. 18, 1968.

66)—three times the cost of the proposed Mineral King road. The Secretary of the Interior and his department considered these alternatives carefully, and concluded, "We have reviewed all material available to us on the proposed location of the Mineral King Road. On the basis of this review we now agree that the division of highways route should be selected" (A. 138).

Finally, at least four different comprehensive studies (A. 57, 83, 140), which considered the impact of the road improvement on the park and the forest, fish and wildlife, the giant Sequoias and streams, possible alternative routes and the opposition to the road, were available to the Secretary before he acted.[95]

At the time the Secretary made his decision about the proposed road he had all the relevant factors before him and considered them carefully. Only when he was sure that park values could be properly protected, that no alternative route was feasible, and that future expansion of the road was not contemplated, did he approve (A. 136-39).

There Is No Clear Error Of Judgment.

Under *Overton Park* the decision of an administrator who has considered all relevant values and followed the appropriate statutory procedures must stand unless it is arbitrary or clearly erroneous. Such a decision is given a strong presumption of regularity and a court will not substitute its judgment for that of the administrator.

The approval of the Mineral King Road by the Secretary of the Interior was neither arbitrary nor erroneous. The 1916 National Park Service Act sets forth two park purposes. One is the preservation of the scenery, wildlife, and

95. See note 5 *supra*.

natural and historic objects in the park. The other is to provide for recreation, for "the enjoyment of the parks" in a way which will leave them unimpaired for their enjoyment by future generations. This does not forbid park improvements which may alter park areas. For example, 16 U.S.C. § 8 specifically authorizes road construction and, "obviously any road construction to present day standards cannot be built through this area without affecting the ecology of the area" (A. 142).

Often the two purposes of recreation and preservation conflict. The Mineral King road is an example of how judicious management of public lands can reconcile these two values—to preserve park areas while providing additional public recreational opportunities. The Sierra Club's single-purpose management philosophy, rejected by the Park Service and Forest Service, would inhibit the cooperative management of the Sequoia National Park-Sequoia National Forest region and effectively seal off the Mineral King area from public recreational use. Mineral King is bounded on the west, north and east by Sequoia National Park. If Mineral King were a part of the park itself, the Secretary of the Interior would have the authority under Section 8 to construct this road. It would be unreasonable to block access to this region because it is in a national forest rather than a national park. In fact, there is a Congressional policy favoring road building to service national forests. 16 U.S.C. Section 532 states:

> Congress hereby finds and declares that the construction and maintenance of an *adequate system of roads and trails within and near the national forest* and other lands administered by the Forest Service is *essential* if increasing demands for timber, *recreation* and other uses of such land are to be met. (Emphasis added.)

The Secretary of the Interior has urged cooperation between land management agencies to achieve both wilderness and recreation goals:

> Parks do not exist in a vacuum. It is important in planning for a park that the teams take into account the total environment in which the park exists. Of particular significance are the plans for and the availability of other park and recreation facilities within the region at the Federal, State, and local levels, as well as those of the private sector for the accommodation of visitors, access to the national parks, the roads within them, wildlife habitat, etc. Accordingly, the master plan team first analyzes the entire region in which the park is located and the many factors that influence its management.
>
> Moreover, where national parks and national forests adjoin, such as Mount Rainier, Yellowstone and Grand Teton National Parks, the National Park Service and the U.S. Forest Service formalized, in 1963, a joint effort to analyze the resources and visitor needs, and develop cooperative plans for the accommodation of these requirements which will best insure the achievement of both of our missions. This program formalizes and broadens the informal efforts made for many years by many park superintendents and forest supervisors to coordinate management programs, including visitor facilities and services. Such cooperative programs are authorized by Section 2 of the Act of August 25, 1916, establishing the National Park Service.[96]

On the basis of such cooperative planning, the Secretary has now made his recommendations to the President for Congressional inclusion of vast areas of Sequoia and Kings Canyon National Parks in wilderness. The Secretary's report to the President notes the need for public recreation areas in the Sequoia-Kings Canyon Region:

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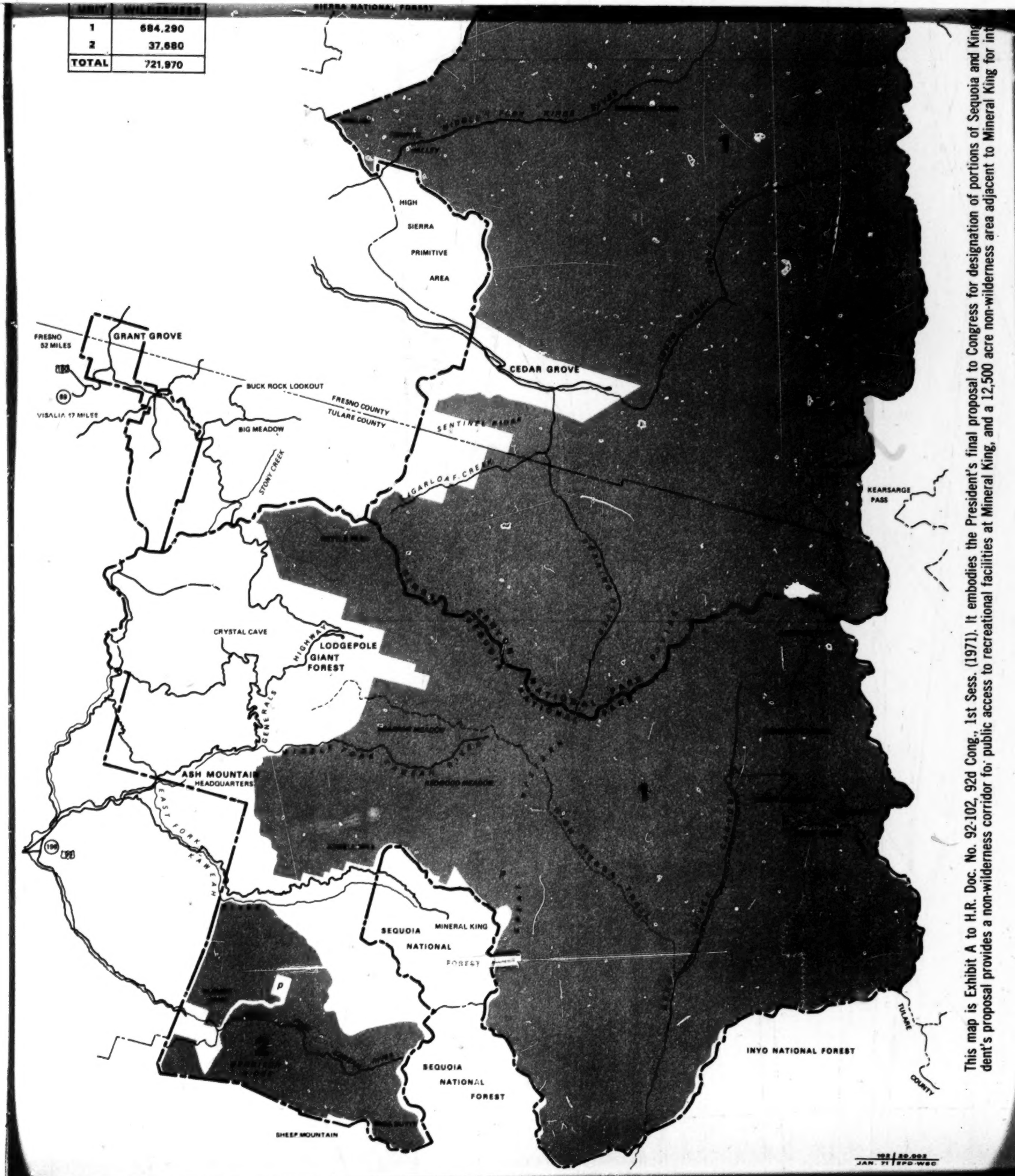
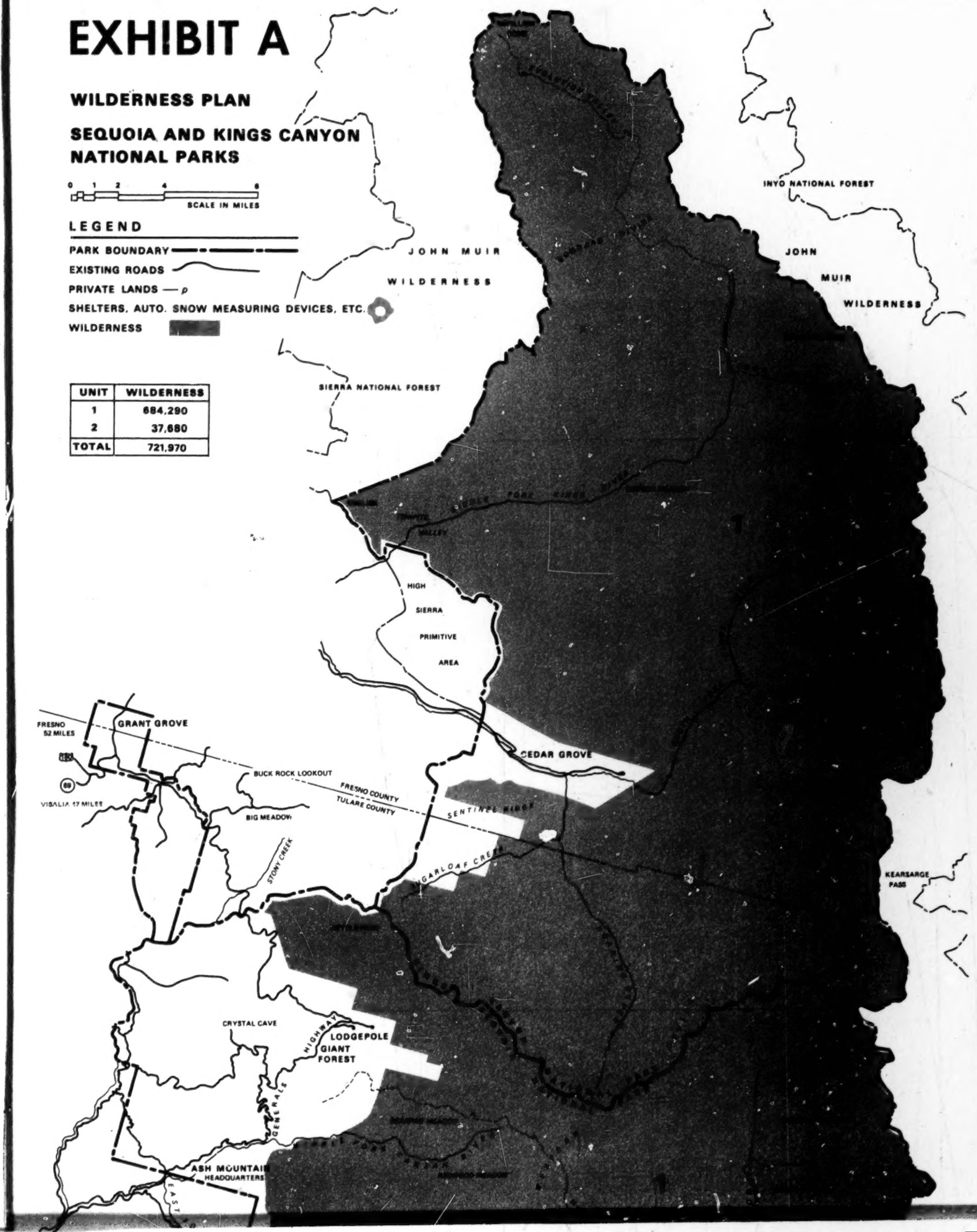
96. H.R. Doc. No. 92-102, 92d Cong., 1st Sess. 4 (1971).



This map is Exhibit A to H.R. Doc. No. 92-102, 92d Cong., 1st Sess. (1971). It embodies the President's final proposal to Congress for designation of portions of Sequoia and King dent's proposal provides a non-wilderness corridor for public access to recreational facilities at Mineral King, and a 12,500 acre non-wilderness area adjacent to Mineral King for int



2102, 92d Cong., 1st Sess. (1971). It embodies the President's final proposal to Congress for designation of portions of Sequoia and Kings Canyon National Parks as wilderness. The Presidential corridor for public access to recreational facilities at Mineral King, and a 12,500 acre non-wilderness area adjacent to Mineral King for intensive public enjoyment of Sequoia National Park.

> The greatest use impact on these public park and forest lands comes from the southern California region, particularly the Los Angeles/Long Beach metropolitan area, which alone contained about 35% of California's 19,950,000 population in 1970.[97]

To meet the need for public recreation the Secretary has recommended exclusion of the Mineral King road corridor and 12,500 acres adjoining Mineral King from the proposed wilderness area. The report notes that the Mineral King facilities, though on Forest Service land, will enable more people to enjoy Sequoia National Park:

> The proposed Mineral King development on national forest lands would provide lifts and trams, as well as improved trail access to the hydrographic divide around the Mineral King Valley which marks the boundary of Sequoia National Park. The lifts and tram transportation system will place thousands of skiers and hikers on park lands where there are superb opportunities for ski touring in winter and hiking in summer.[98]

The Secretary of the Interior's decision to approve the Mineral King road did not deviate from Section 1 requiring him to consider both recreation and preservation in administering the national parks. In recommending commitment of vast areas of Sequoia and Kings Canyon National Parks to wilderness he has promoted preservation. In approving the Mineral King road he has promoted recreation. This does not make his decision arbitrary; it merely makes it inconsistent with the Sierra Club's particular bias. The court in *Sierra Club v. Hardin*, 325 F. Supp. 99, 113 (D.

97. *Id.* at 10.

98. *Id.* at 13.

Alaska 1971), summarized the type of review to be given under the *Overton Park* standard:

> The scope of review is limited, however, to the question of whether or not the Secretary has complied with the mandatory procedures required by the relevant statutes. Where the final decision was dependent on the relative weight to be given the prescribed decisional inputs and no standard was suggested by the statute, the court treated the decision as 'committed to agency discretion' within the meaning of Section 701 of the Administrative Procedure Act and refused to substitute its judgment for that of the administrator absent a clear showing that his discretion had been abused.

Congress has directed the Secretaries of the Interior and Agriculture to increase public use of parks and to enhance recreational opportunities on public lands.[99] The Mineral King road fulfills that Congressional purpose. Since the Secretary of the Interior's decision reflected consideration of the relevant statutory values and was not clearly arbitrary, there was no strong likelihood that he abused his discretion.

4. The Secretary Of The Interior Was Not Required To Hold Hearings On The Road.

There is no merit to the Sierra Club's final contention that the Secretary of the Interior was required to hold public hearings regarding the location and design of the Mineral King access road. No statute or departmental regulation requires such hearings.

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99. See, e.g., the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. § 528, which lists outdoor recreation as a use of the national forests. See also the Outdoor Recreation Programs Act, 16 U.S.C. §§ 460l-13, 77 Stat. 49 (1964); Outdoor Recreation Resources Review Act, 72 Stat. 238 (1958).

Public administrative hearings in connection with land management decisions are required neither by the land management statutes nor by the Administrative Procedure Act.[100] The Sierra Club itself has acknowledged this (A. 41).

However, the Sierra Club contends that the Department of the Interior was required by its published procedures to hold a public hearing on the location and design of the access road. The authority relied upon is a last minute policy statement of Secretary Udall, "Road Building in National Parks," adopted without hearings only two days before he left office in January, 1969.[101] It was immediately and validly revoked by Secretary Hickel.[102]

The Sierra Club argues that this revocation was ineffective because the Secretary did not comply with Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553. That act did not apply to the Udall policy statement. Section 553(a)(2) exempts matters "relating to agency management of personnel or to *public property,* loans, grants, benefits, or contracts," (emphasis added) from rulemaking procedures. The Department of the Interior has often invoked this "public property" exception and courts have approved the exemption.[103]

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100. In 1960 when Congress reexamined the basic land management policies of the Forest Service and enacted the Multiple-Use Sustained-Yield Act, 16 U.S.C. § 528, *et seq.*, it chose not to impose a public hearing requirement in connection with planned recreational uses of national forests. In those few instances in which Congress has desired administrative hearings in connection with public land management decisions, it has specifically so provided in the relevant statute. *E.g.*, Classification and Multiple Use Act, 43 U.S.C. § 1411(a); Wilderness Act, 16 U.S.C. § 1132(d)(B).

101. 34 Fed. Reg. 1405-06 (1969).

102. 34 Fed. Reg. 6985 (1969).

103. For example, the Department held that special rules issued in connection with the Taylor Grazing Act, 43 U.S.C. §§ 315-315r,

The revocation of the Udall policy statement concerned national parks; these are clearly public property. Therefore, the exception applies and Secretary Hickel's revocation was valid.

Even if the "public property" exception were not applicable, Secretary Udall did not comply with 5 U.S.C. § 553 in adoption of the statement on "Road Building in National Parks." He did not give notice of the proposed rulemaking, nor include a statement of the time, place or nature of public rulemaking proceedings, nor did he give interested persons any opportunity to participate in the proposed rulemaking. He signed the rule on the eve of his departure from office and it appeared in the Federal Register thereafter. Under the Sierra Club's own reasoning this policy statement was never validly adopted.

The Sierra Club cannot properly argue two conflicting factual hypotheses. It would have this Court apply Section 553 to the revocation, but not the adoption of Secretary Udall's policy statement. If Section 553 applies to Department of the Interior rulemaking, it applies both to adoption and to revocation; otherwise it applies to neither. In either case no hearing was required.

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relating to grazing privileges on public lands, fell within this exception. When this determination was challenged, the court in McNeil v. Seaton, 281 F.2d 931, 936 (D.C. Cir. 1960), held:

> [T]he notice requirements of section 4 of the Administrative Procedure Act contain an express exception when there is involved rule making relating 'to public property, loans, grants, benefits, or contracts.' That we are here dealing with matter relating to public property is obvious. Although the Taylor Act in certain other respects provides for public notice and hearing, there is no such requirement as to regulations or rulemaking concerning the issuance of grazing permits or a special rule touching problems with respect thereto.

This "public property" exception was again approved by the court in a contest over leasing rights on a moose refuge, Duesing v. Udall, 350 F.2d 748, 752 n.4 (D.C. Cir. 1965).

The Ninth Circuit correctly dismissed the Sierra Club's claim that a hearing was required as unmeritorious, stating: "The matter of public hearings cannot be considered a substantial factor in this proceeding" (A. 233).

III. THERE WAS NO IMMINENT THREAT OF IRREPARABLE HARM TO THE SIERRA CLUB

The evidence available to the trial court on the motion for a preliminary injunction supports the court of appeals' finding that an injunction was not needed to prevent imminent and irreparable harm to the Sierra Club. The trial court decided not to require the Sierra Club to defer its request for injunctive relief until the Division of Highways had completed preliminary planning for the access road, in order to relieve it of the burden of " 'watchful waiting' upon the State of California" (A. 198).

Apparently the trial court was impressed by the Sierra Club's vivid rhetoric. Its arguments have been replete with images of crews with bulldozers and chain saws poised on the edge of Sequoia National Park, ready to lay it waste if not immediately restrained by judicial intervention. The undramatic fact is that, even had the injunction not been issued, no physical alteration of the landscape would have occurred until July, 1970, over a year from the filing of the complaint and nearly a year after the temporary injunction was issued on August 4, 1969.

The affidavits of Richard Deffebach, the supervising District Engineer in the California Department of Public Works (A. 160), W. S. Davis, Assistant Regional Forester in the United States Forest Service (A. 164), and John V. McLaughlin, Superintendent of Sequoia National Park (A. 180), all of whom have been intimately involved with the planning of the Mineral King recreational development,

confirm that if the Department of the Interior had issued a permit to the State of California covering the proposed access road, at least five months would have elapsed before the preliminary plans could have been submitted to the National Park Service for its approval. Thereafter, approval of both the Bureau of Land Management and United States Forest Service was required. Finally, since the winter snows at that time would have made examination of the proposed right-of-way impossible, the State of California could not have called for construction bids until May, 1970, delaying actual construction of any portion of the highway until July, 1970 (A. 162, 163).

The trial court, though recognizing there was no actual imminent threat of change in the natural environment, issued its injunction under the mistaken impression that once the Department of the Interior granted a permit to the California Division of Highways the court would be powerless to protect the land within the Sequoia National Park (A. 198). In fact, the court would have retained jurisdiction of each of the named defendants whose ultimate approval of the detailed road design was required before the State could solicit construction bids on the road. Since the permit was to be revocable the court could have ordered its revocation by the Secretary of the Interior at any time. For reasons of its own the Sierra Club chose not to join the State of California and Disney as defendants. If it had done so, they also would have been subject to the court's equitable jurisdiction. The decision not to name additional defendants was undoubtedly based on the Sierra Club's desire to avoid posting a bond under Rule 65c of the Federal Rules of Civil Procedure by persuading the court that the injunction would not harm the named defendants (A. 202).

It was inappropriate for the court to base its grant of extraordinary injunctive relief on the Sierra Club's tactical decision not to join the persons most affected by the injunction as defendants.

There was no showing of imminent physical harm to park land. The burden on the Sierra Club of monitoring the progress of planning the access road by the State of California so it could request injunctive relief if an appropriate time ever arose would have been inconsequential. Since a showing of imminent and irreparable harm is a necessary condition to the issuance of any injunction,[104] the district court should have denied the Sierra Club's motion for a preliminary injunction.

The trial court's extreme solicitude for the Sierra Club's convenience has imposed substantial costs upon interested non-parties. The nominal defendants, government employees, have no financial stake in the outcome, but the injunction has already cost the United States two years of permit fees it will collect from the operation of the recreation facility at Mineral King—a minimum of $75,000 per year (A. 169). The State of California has suffered an annual increase in construction costs from 3% to 5%, a sum already approximating more than $1.5 million (A. 163). The cost of construction of the facilities planned by Disney has escalated in the same way. Skiers and other potential users of the completed recreational area are disappointed by the delays involved and may eventually pay more for lift tickets to finance the recreational facilities.

The most severe impact has fallen upon the residents of Tulare County who are being denied the use of Mineral King and deprived of an estimated $1.5 million in annual tax

104. Yakus v. United States, 321 U.S. 414 (1944).

revenues which the completed development will bring to the County.

The Sierra Club's contention that the trial court "tailored" the injunction to enjoin only "physical disturbance of the terrain" (B. 37) is deliberately naive. The affidavit of Mr. Deffebach, the California Department of Public Works Engineer, made it clear that the issuance by the Interior Department of its special use permit covering the access road (which was specifically enjoined) is a prerequisite to the planning, land acquisition, and contract preparation activities which must precede the solicitation of bids, awards of contracts, and actual construction. As a matter of prudent financial management, the State of California has not and will not accomplish any significant planning for the access road while the Interior Department is subject to an outstanding injunction barring issuance of the road permit. For all practical purposes, development of the recreational potential of Mineral King has been at a standstill since August, 1969.

The district court's issuance of the preliminary injunction to the Sierra Club was an abuse of discretion. The Sierra Club failed to show any irreparable harm; the preliminary injunction was properly vacated by the Ninth Circuit on that ground alone.[105]

CONCLUSION

The United States Court of Appeals for the Ninth Circuit reversed the district court order granting a preliminary injunction, holding that the Sierra Club lacked standing to maintain the action and further unanimously holding that

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105. See 7 MOORE'S FEDERAL PRACTICE § 65.04 (1); Udall v. D.C. Transit System, Inc., 404 F.2d 1358, 1361 (D.C. Cir. 1968); Foundry Services v. Beneflux, 206 F.2d 214, 216 (2d Cir. 1953).

there was little or no likelihood the Sierra Club would prevail on the merits. The Sierra Club asserts it has standing as a private attorney general, but for this Court to uphold this contention it must virtually abolish the requirement of standing to maintain actions against federal officials in the federal courts. To so hold would alter fundamentally the relationship of the judiciary and the executive branches, thrusting onto the judiciary a heavy burden of day-to-day management of the public lands, a burden it is not equipped to assume.

In deciding whether to issue a preliminary injunction the district judge was obliged to assess the likelihood that the Sierra Club would succeed on the merits. The scope of review of the administrator's action is limited. There is no strong likelihood that either the Secretary of Agriculture or the Secretary of the Interior, or their subordinate officials, acted outside the scope of their authority, abused their discretion or made any procedural error in deciding how best to manage the federal lands at Mineral King. Therefore, the unanimous holding of the Ninth Circuit that there was little or no likelihood of the Sierra Club's success on the merits and that the issuance of a preliminary injunction was an abuse of discretion was correct.

For the foregoing reasons your amicus respectfully requests that the judgment of the Ninth Circuit be affirmed.

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